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Fifth report on identification of customary international law

by Michael Wood, Special Rapporteur*

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Introduction

1. At its sixty-fourth session, in 2012, the International Law Commission placed the topic "Formation and evidence of customary international law" on its current programme of work, and held an initial debate on the basis of a preliminary note by the Special Rapporteur.[1]

2. At its sixty-fifth session, the Commission held a general debate on the basis of the Special Rapporteur's first report[2] and a memorandum by the Secretariat entitled "Elements in the previous work of the International Law Commission that could be particularly relevant to the topic".[3] The Commission changed the title of the topic to "Identification of customary international law".[4]

3. At its sixty-sixth session, the Commission considered the Special Rapporteur's second report.[5] Following the debate, the 11 draft conclusions proposed in the report were referred to the Drafting Committee, which provisionally adopted 8 draft conclusions.[6]

4. At its sixty-seventh session, the Commission considered the Special Rapporteur's third report, which sought to complete the set of draft conclusions on the topic.[7] Following the debate, the draft conclusions proposed in the third report were referred to the Drafting Committee, which provisionally adopted eight more draft conclusions as well as additional paragraphs for two of the draft conclusions already adopted. The Commission took note of draft conclusions 1 to 16 as provisionally adopted by the Drafting Committee, in anticipation that the adoption on first reading of the draft conclusions (as well as commentaries thereto) would be considered the following year.

5. At its sixty-eighth session, in 2016, the Commission considered the Special Rapporteur's fourth report, which responded to the main comments and suggestions made by States and others in relation to the 16 draft conclusions provisionally adopted.[8] The report also considered the ways and means for making the evidence of customary international law more readily available, with a view to renewing the Commission's engagement with this subject. The Commission also had before it a preliminary bibliography on the topic,[9] as well as a further memorandum by the Secretariat entitled "The role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law".[10]

6. The Commission debated the Special Rapporteur's fourth report from 19 to 24 May 2016, and referred to the Drafting Committee the proposed amendments to

[1] A/CN.4/653.

[2] First report on formation and evidence of customary international law by Special Rapporteur Michael Wood (A/CN.4/663).

[3] A/CN.4/659.

[4] A/CN.4/SR.3186, provisional summary record of the Commission's 3186th meeting (25 July 2013), pp. 5–6.

[5] Second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672).

[6] The Drafting Committee was unable to consider two draft conclusions because of lack of time, and one draft conclusion was omitted.

[7] A/CN.4/682.

[8] Fourth report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/695).

[9] *Ibid.* (A/CN.4/695/Add.1).

[10] A/CN.4/691.

the draft conclusions contained therein. In addition, an open-ended Working Group was established to review a set of informal draft commentaries prepared by the Special Rapporteur. On 2 June 2016, the Commission considered and adopted the report of the Drafting Committee on draft conclusions 1 to 16, thereby adopting on first reading a set of 16 draft conclusions.[11] On 5 and 8 August 2016, the Commission adopted the commentaries.[12] The Commission also requested the Secretariat to prepare a memorandum on ways and means for making the evidence of customary international law more readily available, which would survey the present state of the evidence of customary international law and make suggestions for its improvement.[13]

7. In accordance with articles 16 to 21 of its statute, the Commission decided in 2016 to transmit the draft conclusions adopted on first reading, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2018.[14]

8. In the Sixth Committee debate in 2016, in which some fifty speakers addressed the topic,[15] delegations commended the work done by the Commission on the topic to date. They generally welcomed the draft conclusions, the commentaries and the bibliography as important texts that would greatly facilitate the work of practitioners and academics. Delegations also expressed appreciation to the Secretariat for the memorandum on the role of decisions of national courts in the case law of international courts and tribunals. Many delegations made detailed comments on the text adopted on first reading, providing valuable suggestions as to how specific draft conclusions and the commentary might be refined.[16]

9. As of the date of submission of the present report, the following States have transmitted written comments and observations in response to the Commission's request: Austria; Belarus; China; Czech Republic; El Salvador; Israel; Netherlands; New Zealand; Nordic countries (Denmark, Finland, Iceland, Norway and Sweden); Republic of Korea; Singapore; and United States of America.[17]

10. In accordance with the programme of work set out in 2016,[18] the present report seeks to address the main comments and observations that have been made on the draft conclusions and commentaries adopted on first reading, both in the 2016 debate in the Sixth Committee and in writing in response to the Commission's request. As

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[11] See A/71/10, paras. 57 and 62.

[12] *Ibid.*, para. 63.

[13] *Ibid.*, para. 56.

[14] *Ibid.*, para. 15.

[15] Algeria, Argentina, Australia, Austria, Belarus, Brazil, Chile, China, Colombia, Cuba, Cyprus, Czech Republic, Dominican Republic (on behalf of the Community of Latin American and Caribbean States), Ecuador, Egypt, El Salvador, Finland (on behalf of the Nordic countries), France, Germany, Greece, India, Indonesia, Iran (Islamic Republic of), Ireland, Israel, Japan, Malaysia, Mexico, Mongolia, Netherlands, Peru, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Singapore, Slovakia, Slovenia, Spain, Sudan, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Viet Nam, Council of Europe, European Union (also on behalf of Serbia and Bosnia and Herzegovina), and International Committee of the Red Cross.

[16] See the topical summary of the discussions held in the Sixth Committee of the General Assembly during its seventy-first session, prepared by the Secretariat (A/CN.4/703).

[17] Reference in this report to "written comments" is to written comments in response to the Commission's request. Any written comments received after the date of submission of the report will also be considered by the Commission during its seventieth session.

[18] Fourth report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/695), paras. 50–53.

noted above and as several States have recognized,[19] comments and suggestions made during earlier stages of work on the topic have already been taken into account.

11. The draft conclusions and commentaries adopted on first reading have also received attention from practitioners and scholars: they have been cited by courts,[20] and been discussed at several academic events[21] and in scholarly writings.[22]

12. Following this introduction, the present report is structured as follows. Chapter I describes the main comments and observations of States on the draft conclusions and commentaries adopted on first reading, and sets out the suggestions of the Special Rapporteur in response. Chapter II considers the memorandum prepared by the Secretariat on "Ways and means for making the evidence of customary international law more readily available", and how the suggestions in the memorandum might be taken forward. Chapter III contains the Special Rapporteur's recommendations for the final form of the Commission's output. Annex I indicates the Special Rapporteur's suggested changes to the draft conclusions adopted on first reading. Annex II, containing an updated bibliography on the topic, will be distributed later in the session.

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[19] See, for example, A/C.6/71/SR.21, para. 75 (Austria) and para. 116 (Germany); A/C.6/71/SR.22, para. 40 (Singapore) and para. 70 (Malaysia); written comments of New Zealand, para. 2; written comments of China, p. 1.

[20] *R (on the application of the Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs*, [2016] All ER (D) 32 (5 August 2016), paras. 77–78; *Mohammed and others v Ministry of Defence*, [2017] UKSC 2 (17 January 2017), para. 151; *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah* [2017] UKSC 62 (18 October 2017), paras. 31–32.

[21] The Special Rapporteur has participated in various events at which the draft conclusions and commentaries were discussed, including at Cambridge University; the European University Institute; the University of Manchester; La Sapienza University, Rome; and the University of Michigan.

[22] See, for example, the special issue on customary international law of *International Community Law Review*, vol. 19 (2017); B.D. Lepard, *Reexamining Customary International Law* (Cambridge, United Kingdom, Cambridge University Press, 2017); N. Blokker, "International organizations and customary international law: is the International Law Commission taking international organizations seriously?", *International Organizations Law Review*, vol. 14 (2017), pp. 1–12; M. Fitzmaurice, "Customary law, general principles, unilateral acts", in *Nicaragua Before the International Court of Justice: Impacts on International Law*, E. Sobenes Obregon and B. Samson, eds. (Cham, Springer, 2017), pp. 247–267; R. Deplano, "Assessing the role of resolutions in the ILC draft conclusions on identification of customary international law: substantive and methodological issues", *International Organizations Law Review*, vol. 14 (2017), pp. 227–253; C.A. Bradley, ed., *Custom's Future: International Law in a Changing World* (Cambridge, United Kingdom, Cambridge University Press, 2016); L. Kirchmair, "What came first: the obligation or the belief? A renaissance of consensus theory to make the normative foundations of customary international law more tangible", *German Yearbook of International Law*, vol. 59 (2016), pp. 289–319; K. Gastorn, "Defining the imprecise contours of *jus cogens* in international law", *Chinese Journal of International Law*, vol. 16 (2018), pp. 1–20; E. Henry, "Alleged acquiescence of the international community to revisionist claims of international customary law (with special reference to the *jus contra bellum* regime)", *Melbourne Journal of International Law*, vol. 18 (2017), pp. 260–297; J. d'Aspremont and S. Droubi, eds., *International Organizations and the Formation of Customary International Law* (Manchester, Manchester University Press, forthcoming 2018); C.A. Bradley and J.L. Goldsmith, "Presidential control over international law", *Harvard Law Review*, vol. 131, No. 5 (2018); G.H. Fox, K.E. Boon and I. Jenkins, "The contributions of United Nations Security Council resolutions to the Law of Non-International Armed Conflict: new evidence of customary international law", *American University Law Review*, vol. 67 (2018); N. Lamp, "The 'practice turn' in international law: insights from the theory of structuration", in *Research Handbook on the Sociology of International Law*, M. Hirsch and A. Lang, eds. (Cheltenham, Edward Elgar, forthcoming 2018).

I. Comments and observations on the draft conclusions adopted on first reading

13. The Special Rapporteur is very grateful to all who commented orally and in writing on the draft conclusions and commentaries adopted on first reading. While, as is to be expected, the comments sometimes pull in opposite directions, they are without exception thoughtful and constructive, and should greatly assist the Commission in improving the Commission's final output.

14. The comments and observations received are considered in two parts below: General comments and observations on the draft conclusions as a whole (section A); and comments and observations on particular draft conclusions (section B). In each case, the comments and observations are briefly described, and then the Special Rapporteur makes his suggestions, mainly for the text of the conclusions but also indicating, at least in general terms, whether changes should be made to the commentaries. For ease of reference, the suggested changes to the conclusions are set out at annex I to the report.

A. General comments and observations

1. *Comments and observations received*

15. In commenting on the draft conclusions and commentaries adopted by the Commission on first reading in 2016, States suggested that the draft conclusions would "undoubtedly become a useful tool for practitioners in identifying the existence and scope of customary [international] law".[23] Many of the propositions contained in

[23] See A/C.6/71/SR.20, para. 52 (Finland, speaking on behalf of the Nordic countries). See also A/C.6/71/SR.20, para. 56 (United States, saying that the draft conclusions and commentaries thereto were "already an important resource for practitioners and scholars"); A/C.6/71/SR.21, paras. 12 and 16 (Australia, noting that "the draft conclusions provided a flexible and practical methodology for the identification of such rules and their content"); *ibid.*, para. 85 (United Kingdom, noting that "[t]he draft conclusions and commentaries were a valuable, accessible tool for judges and practitioners"); *ibid.*, para. 93 (Portugal, saying that "[t]he topic 'Identification of customary international law' was of high practical value for legal advisers and practitioners around the world" and that "[a] set of practical and simple conclusions to assist in the identification of rules of customary international law would be a useful tool"); A/C.6/71/SR.22, para. 6 (Greece, observing that "[t]he Commission's work provided international lawyers with much needed normative guidance in dealing with the thorny issue of the identification and precise content of customary international law rules"); *ibid.*, para. 22 (Mexico, saying that the draft conclusions "provided useful guidance"); *ibid.*, para. 33 (Ireland, saying that "the draft conclusions, commentaries and bibliography would ... serve as a useful resource"); *ibid.*, para. 61 (Japan, saying that the topic "had the potential to make a useful contribution to the development of international law"); A/C.6/71/SR.23, para. 24 (Slovakia, appreciating that the draft conclusions and commentaries "were a tangible and valuable outcome that would help judges and legal practitioners in identifying customary international rules in practice"); *ibid.*, para. 41 (Egypt, saying that the draft conclusions "would be of assistance to courts and practitioners alike"); A/C.6/71/SR.24, para. 13 (Ecuador, submitting that the methodology offered by the Commission "would be of great service to legal practitioners, in particular judges, who were often called upon to determine whether rules of customary international law could be discerned in the cases before them"); A/C.6/71/SR.29, para. 97 (Mongolia, commending the work on the topic and adding that "the draft conclusions would further contribute to the application of customary international law as an important source of public international law"); written comments of Singapore, para. 1 (being "of the view that the Commission's final output will be of valuable practical guidance for States, international courts and tribunals and practitioners"); written comments of New Zealand, para. 1 (saying that "[t]he draft conclusions can be expected to be a helpful reference point for

the draft conclusions and commentaries were explicitly and widely endorsed. The "careful and balanced approach"[24] adopted by the Commission throughout its work on the topic, and the efforts to take into account the practice of different national legal systems and traditions,[25] were commended.

16. While the Commission's efforts to make the draft conclusions concise and accessible (with detail in the commentaries) were appreciated, it was also suggested that in places a better balance could be struck between the texts of the conclusions and that of the accompanying commentary. According to New Zealand, "the desire to keep the Draft Conclusions brief and not overly prescriptive has resulted in general statements that do not always provide clear guidance".[26] A number of specific suggestions were made by States to this effect, which are considered below in relation to individual conclusions.

17. The United States expressed concern that the draft conclusions and commentaries "could give the impression that customary international law was easily formed or identified",[27] and China proposed adding a third paragraph to draft conclusion 3 indicating that "in the identification of customary international law, a rigorous and systematic approach shall be applied".[28] Israel suggested that the commentary should indicate that the identification of customary international law "involves an exhaustive, empirical and objective examination of available evidence".[29] France, however, suggested that "[t]he commentaries to the draft [conclusions] would benefit from the inclusion of examples of cases in which a rule of customary international law had been deemed to exist, as almost all of the examples in the current draft concerned cases in which the existence of a rule had been rejected".[30]

18. It was suggested that in two specific respects the draft conclusions might go beyond current methodology and even be considered as "progressive development", namely, the relevance of practice of international organizations to the formation and identification of customary international law;[31] and the existence of rules of particular

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practitioners and others called upon to identify and apply norms of customary international law"); written comments of China, p. 2 (expressing its hope that "the conclusions and commentaries, and the results of the research conducted by the Secretariat, can provide unified and clear guidance on international law and practice"; written comments of the Republic of Korea, para. 2 (observing that "[t]he draft conclusions are expected to provide authoritative guidelines on the identification and confirmation of customary international law to practitioners in various domestic legal forums"). See also A/C.6/71/SR.24, para. 25 (International Committee of the Red Cross, congratulating the Commission on the adoption of the draft conclusions and "greatly appreciat[ing] the Commission's consideration of questions arising in identifying customary international law").

[24] See A/C.6/71/SR.21, para. 116 (Germany).

[25] See A/C.6/71/SR.20, para. 72 (France).

[26] Written comments of New Zealand, para. 5 (adding, while appreciating the Commission's efforts to make the draft conclusions concise and accessible, that "New Zealand understands that the draft conclusions are expected to be read together with their commentaries. But the text of the draft conclusions should still be capable of standing alone. There are a number of occasions in which the Commentaries contain significant qualifications to the general language of the draft conclusions. In New Zealand's view these elements should also be included in the text of the draft conclusions themselves"). See also A/C.6/71/SR.20, para. 45 (European Union, Serbia, and Bosnia and Herzegovina).

[27] See A/C.6/71/SR.20, para. 58.

[28] Written comments of China, p. 2.

[29] Written comments of Israel, para. 32.

[30] See A/C.6/71/SR.20, para. 72.

[31] See written comments of the United States, pp. 1–2, and A/C.6/71/SR.20, paras. 56–57 (United States); A/C.6/71/SR.22, para. 38 (Israel); written comments of New Zealand, para. 4 (noting the "absence of judicial authority in the commentary to this [matter]").

customary international law applying bilaterally and/or among States linked by a common cause, interest or activity other than their geographical position.[32] It was suggested in this context that the Commission's output on the topic should not include recommendations for "progressive development", but that if it did, they should be clearly identified.

2 Suggestions by the Special Rapporteur

19. The Special Rapporteur recalls that the draft conclusions are to be read together with the commentaries.[33] He has previously noted that "the need to achieve a balance between making the draft conclusions clear and concise on the one hand, and comprehensive on the other, needs constantly to be borne in mind".[34] The comments now received suggest that several points currently dealt with in the commentaries should find some reflection in the conclusions themselves. The Special Rapporteur makes a number of suggestions to this effect in the present report.

20. It should also be remembered, however, that the conclusions ought not to be too rigid, for at least three reasons. First, they need to apply in the wide range of possible situations that may arise in practice. Second, customary international law as a source of law inherently defies exact formulations. Thus, as Australia has put it, a measure of flexibility in setting out the methodology for identification of customary international law "was essential to ensure that the dynamism which characterized the formation and development of rules of custom was reflected in the Commission's guidance on the topic".[35] Finally, important nuances may be better captured in the commentaries, the precise role of which is to explain in more detail the conclusions. The commentaries, in the words of Singapore, "should be applied together with the ... conclusions as an indissoluble whole".[36] The Special Rapporteur suggests that the general commentary introducing the conclusions should emphasize that the conclusions and commentaries are to be read together.

21. The Special Rapporteur does not understand the Commission as having intended that any of the conclusions or commentaries adopted on first reading should do other than state the existing methodology for identifying rules of customary international law. This is consistent with the view endorsed at the outset of the Commission's work on the topic, namely that "the Commission should aim to describe the current state of international law on the formation and evidence of rules of customary international law, without prejudice to developments that might occur in the future".[37] The purpose of the topic is to offer practical and authoritative guidance on how to identify rules of customary international law, and it is essential that in doing so the Commission seeks

[32] Written comments of the United States, p. 19; written comments of the Czech Republic, p. 3.

[33] See also A/71/10, footnote 245.

[34] See the fourth report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/695), para. 14.

[35] See A/C.6/71/SR.21, para. 12 (noting that the draft conclusions "provided a flexible and practical methodology for the identification of such rules [of customary international law] and their content"). See also written comments of the Republic of Korea, para. 2 ("a proper balance is required between the clarity of rules and the inherent flexibility of customary international law"). There was general agreement among members of the Commission early on, that "in drafting conclusions [on the present topic] the Commission should not be overly prescriptive" (second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672), para. 3 (c)).

[36] See A/C.6/71/SR.22, para. 40.

[37] See the first report on formation and evidence of customary international law by Special Rapporteur Michael Wood (A/CN.4/663), para. 16.

to reflect a settled methodology. In any event, most States that commented on the matter indicated that they considered that the draft conclusions did accurately reflect the existing position: as the Republic of Korea put it, "the draft conclusions are well organized overall, properly reflecting the current state of international law on the topic".[38] The Special Rapporteur recognizes, however, that there could be greater precision with respect to the relevance of practice of international organizations and with respect to rules of particular customary international law. Suggestions to this effect are made in the present report.

22. The Special Rapporteur fully agrees with those who have observed that rigour is important when identifying rules of customary international law.[39] However, he considers that the present text of the conclusions and commentary adequately addresses this point, including at the very outset of the general commentary.[40]

B. Comments and observations on particular draft conclusions

Part One: Introduction

Conclusion 1: Scope

1. Comments and observations received

23. Several States endorsed the scope of the draft conclusions, "namely that they are limited to identification of customary international law, and without focus on the relationship to other sources of international law or *jus cogens*".[41] Japan considered that the Commission was "justified in arguing that the aim of the topic should be to assist in determining the existence and content of a rule as of a particular time".[42] Australia said that "it was not the purpose of the Commission's work to provide guidance on the inherent difficulty of determining when State practice had reached a critical mass such that customary international law was formed. Instead, the draft conclusions provided guidance to practitioners on how to determine the existence or content of a customary rule at a particular point in time".[43] Poland, on the other hand, considered it "unfortunate that neither the draft conclusions nor the commentary went into the question of how the rules of customary international law evolved".[44]

24. Spain considered that a conclusion "regarding the burden of proof of the existence and content of customary rules" should be added.[45] The Russian Federation expressed its preference that the statement explaining that the relationship between customary international law and other sources of international law falls outside the

[38] Written comments of the Republic of Korea, para. 1.

[39] See also the fourth report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/695), para. 15.

[40] See A/71/10, para. 63, para. (1) of the general commentary ("a structured and careful process of legal analysis and evaluation is required").

[41] Joint Nordic written comments (2017), p. 1; see also, for example, A/C.6/71/SR.21, para. 6 (Czech Republic).

[42] See A/C.6/71/SR.22, para. 63 (explaining that "customary international law could be formed in several ways, depending on the subject of the rule or the circumstances. It was not feasible to identify the manner in which the rule was formed or the precise moment at which it came into being").

[43] See A/C.6/71/SR.21, para. 15.

[44] See A/C.6/71/SR.22, para. 31.

[45] See A/C.6/71/SR.21, para. 111.

scope of the topic, currently placed in the commentary to draft conclusion 1, should become a conclusion of its own.[46]

2. Suggestions by the Special Rapporteur

25. The Special Rapporteur has no changes to suggest to draft conclusion 1, as adopted on first reading. He recalls that the conclusions do not overlook the formation of customary international law. As has been explained, both formation and identification of customary international law may tend, in practice, to coalesce, given that the elements that constitute customary international law also serve to ascertain its existence.[47] Thus the change of the topic's name was made on the understanding that matters relating to the formation of customary international law remained within the scope of the topic;[48] and, as the statement of the Chairperson of the Drafting Committee in 2014 confirmed, the reference in draft conclusion 1 to the determination of the existence and content of rules of customary international law "implied inevitably an investigation into the[ir] formation".[49] This is already reflected in the commentary.[50]

26. The Special Rapporteur notes that the question of a burden of proof when identifying a rule of customary international law has already been raised within the Commission.[51] Whether such a burden of proof exists at the national level (and, if so, upon whom it lies) will depend on the national legal system and, as the Commission has explained in the commentary, the conclusions "do not address the position of customary international law within national legal systems".[52] At the international level, the identification of a rule of customary international law would usually be a matter of legal analysis rather than overcoming a burden proof by one of the parties[53] (at least in the case of general, as opposed to particular, customary international

[46] *Ibid.*, para. 45.

[47] A/CN.4/SR.3254, provisional summary record of the Commission's 3254th meeting (21 May 2015), p. 10.

[48] A/CN.4/SR.3186, provisional summary record of the Commission's 3186th meeting (25 July 2013), p. 6.

[49] Statement of the Chairman of the Drafting Committee (7 August 2014), p. 3 (available at http://legal.un.org/ilc/).

[50] See A/71/10, para. 63, para. (4) of the commentary to draft conclusion 1.

[51] A/CN.4/SR.3227, provisional summary record of the Commission's 3227th meeting (18 July 2014), p. 6.

[52] See A/71/10, para. 63, para. (5) of the commentary to draft conclusion 1.

[53] See, with regard to the International Court of Justice but possibly also beyond, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at pp. 24–25, para. 29: "For the purpose of deciding whether the claim is well founded in law, the principle *jura novit curia* signifies that the Court is not solely dependent on the argument of the parties before it with respect to the applicable law" (cf. *"Lotus", P.C.I.J., Series A, No. 10*, p. 31) ... As the Court observed in the *Fisheries Jurisdiction* cases: "The Court ... as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court" (*I.C.J. Reports 1974*, p. 9, para. 17; p. 181, para. 18).

law[54]). For these reasons, a conclusion on burden of proof is unnecessary and could be misleading.

27. It does not seem necessary to include a conclusion on the relationship between customary international law and other sources of international law; the title of the topic makes it clear that the conclusions only concern the identification of customary international law, though in that connection they do of course address the role of treaties, as well as judicial decisions and teachings. The Special Rapporteur had previously suggested a second paragraph for the conclusion on scope, to clarify that the conclusions on the topic are without prejudice to other sources of international law and to questions relating to *jus cogens*,[55] but withdrew this suggestion following the plenary debate.[56] The commentary adopted on first reading already indicates that no attempt is made under the present topic to explain the relationship between customary international law and other sources of international law.[57]

Part Two: Basic approach

Conclusion 2: Two constituent elements

1 Comments and observations received

28. Draft conclusion 2 received wide support from States, thus once more confirming their approval of the two-element approach underpinning the conclusions and its applicability in all fields of international law.[58]

29. A number of changes to the draft commentary were suggested. The United States, while agreeing with the present text that the two-element approach "does not ... preclude a measure of deduction", suggested that it be revised "to emphasize that a deductive approach must be used with caution to avoid identifying purported rules as customary international law that do not result from a general and consistent practice of States followed by them out of a sense of legal obligation".[59] Israel considered that any reference to deduction might undermine the requirement for empirical examination of evidence in identifying rules of customary international law, and suggested that it be deleted altogether.[60] The Russian Federation considered that

[54] As the commentary to conclusion 16 explains (by reference to the jurisprudence of the International Court of Justice), "[t]he Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party" (A/71/10, para. 63, para. (6) of the commentary to conclusion 16).

[55] See the second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672), para. 15.

[56] See Statement of the Chairman of the Drafting Committee (7 August 2014), pp. 3–4, available from http://legal.un.org/ilc/ ("The originally proposed paragraph 2 of draft conclusion 1 was a 'without prejudice' clause excluding from the scope of the draft conclusions the question of the methodology pertaining to the identification of other sources of international law or peremptory norms of general international law (*jus cogens*). Further to the debate in Plenary, the Special Rapporteur suggested the deletion of this provision, preferring instead to leave such questions to the commentary. There was a general sense that draft conclusion 1 should be kept as simple as possible and that paragraph 2 could indeed be deleted").

[57] See A/71/10, para. 63, para. (5) of the commentary to conclusion 1.

[58] See, for example A/C.6/71/SR.21, para. 48 (Russian Federation), para. 84 (United Kingdom), para. 99 (Chile), para. 137 (Sudan); A/C.6/71/SR.22, para. 38 (Israel), para. 44 (Thailand), para. 50 (Viet Nam); A/C.6/71/SR.23, para. 24 (Slovakia), written comments of Belarus, p. 2.

[59] Written comments of the United States, p. 9 (also suggesting that the phrase "indivisible regime" should be deleted).

[60] Written comments of Israel, para. 32.

the reference in this context to previously existing rules, such as those forming part of an "indivisible regime", may better be viewed as the overall context that needs to be examined in identifying a rule of customary international law (the subject of draft conclusion 3).[61]

2 Suggestions by the Special Rapporteur

30. The Special Rapporteur does not suggest any changes to draft conclusion 2, as adopted on first reading. Changes to the commentary may be suggested in due course, in order to clarify that the reference to "deduction" is not intended to suggest a substitute for the basic two-element approach, but rather an occasional aid for the application of that approach in cases such as those referred to in the draft commentary.

Conclusion 3: Assessment of evidence for the two constituent elements

1 Comments and observations received

31. States expressed their appreciation of the clarification provided by draft conclusion 3, namely, that any analysis as to the existence of a rule of customary international law ought to take account of the overall context, the nature of the rule, and the particular circumstances in which the evidence is to be found.[62] A number of States also "welcomed the explicit reference in the draft conclusions to the fact that general practice and acceptance as law (*opinio juris*) should be separately ascertained, while admitting that there were circumstances where the same evidence might be used to establish the existence of both elements".[63]

32. The Netherlands considered it unclear "whether the process for identifying the existence of a rule is the same as the process for determining the content of that rule", and suggested that the commentary to conclusion 3 should address this question.[64] Israel considered that the draft commentary's reference to the relevance of the *opinio juris* of those in a position to react to a certain practice should be deleted, explaining that "[g]eneral opinions offered by States who have *no practice* [of their own] with regard to the rule in question are not relevant to the customary international law identification process".[65] It also suggested several amendments to the commentary so as to avoid undue flexibility in identifying customary international law.[66] Israel further suggested that the reference in the conclusion to the need to have regard to "the nature of the rule", while correct, in fact is only relevant to the determination of prohibitive rules of customary international law and that this should be made explicit.[67]

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[61] See A/C.6/71/SR.21, paras. 46–47.

[62] See, for example, A/C.6/71/SR.21, para. 7 (Czech Republic), para. 14 (Australia), para. 137 (Sudan), and the written comments of China, pp. 1–2.

[63] See A/C.6/71/SR.20, para. 51 (Finland, on behalf of the Nordic countries); see also joint Nordic written comments, p. 1; A/C.6/71/SR.21, para. 14 (Australia), para. 48 (Russian Federation), para. 137 (Sudan); A/C.6/71/SR.22, para. 34 (Ireland); A/C.6/71/SR.23, para. 24 (Slovakia); A/C.6/71/SR.24, para. 10 (Indonesia).

[64] Written comments of the Netherlands, para. 5 (adding that "this is not necessarily the case. For example, in the identification of the content of a particular rule, any underlying principles of international law may need to be taken into account in accordance with draft conclusion 3, paragraph 1, whereas this may not be the case when identifying the existence of the rule"). See also written comments of Israel, para. 32(3).

[65] Written comments of Israel, para. 8.

[66] *Ibid.*, at para. 32.

[67] *Ibid.*

2 Suggestions by the Special Rapporteur

33. The Special Rapporteur makes no suggestion to amend draft conclusion 3. It remains to be considered whether changes to the commentary are desirable in the light of the comments noted above. In the opinion of the Special Rapporteur, there is no reason why, in principle, a consideration of all the factors stipulated in the conclusion should not be relevant to the identification of either the existence or the content of a rule of customary international law, even if in particular cases one or more of them may prove more significant than in others. The reference to the "nature of the rule", while indeed particularly relevant to the identification of prohibitory rules (and thus referred to "in particular" in the commentary), may also be applicable to other rules, such as those that represent an exception to a more general rule, or that bind only certain subjects of international law. Here, too, the language of conclusion 3 aims to provide both a signpost for the caution necessary in identifying a rule of customary international law as well as some measure of flexibility, allowing account to be taken of any specific circumstances related to the rule in question.

34. As for the relevance of the legal opinions of States other than those engaged in a certain practice, the Special Rapporteur considers that an inquiry into the *opinio juris* that may accompany instances of the relevant practice should be complemented by a search for the *opinio juris* of other States in order to verify whether States are generally in agreement or are divided as to the binding nature of a certain practice.[68] As the International Court of Justice has explained, "[e]ither the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'".[69] In the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, for example, it was precisely because "the members of the international community [were] profoundly divided on the matter of whether non-recourse [by a certain number of States] to nuclear weapons ... constitute[d] the expression of an *opinio juris*", that the Court "[did] not consider itself able to find that there is such an *opinio juris*" and thus a corresponding rule of customary international law.[70]

Part Three: A general practice

Conclusion 4: Requirement of practice

1 Comments and observations received

35. States commenting on draft conclusion 4 all agreed that customary international law was, in principle, created and evidenced by the practice of States. The Russian

[68] See the second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672), para. 64 and the references therein.

[69] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 109, para. 207 (citation omitted, indicating also that "[r]eliance by a State on a novel right or an unprecedented exception to the principle might, *if shared in principle by other States*, tend towards a modification of customary international law" (emphasis added)).

[70] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 254, para. 67.

Federation suggested that in order to better reflect this established position, the word "primarily" in paragraph 1 of the conclusion should be deleted.[71]

36. Views differed, however, on the possible relevance of practice of international organizations, referred to in paragraph 2 of draft conclusion 4. The majority of States commenting on the draft conclusion expressed support for the proposition that "in certain cases, the practice of international organizations also contributes to the formation, or expression, or rules of customary international law".[72] Romania, for example, explained that States, "by transferring competences to international organizations, had created a role for the latter in the identification of customary international law", and observed in this context that "[g]enerally speaking, the draft conclusions were reflective of the status quo".[73] The Nordic countries similarly remarked that they "share the view, as expressed in draft conclusion 4, that in certain instances the practice of international organizations can contribute to the formation, or be the expression, of rules of customary international law".[74] They added that this "is particularly the case in instances where such organizations have been granted powers by member States to exercise competence on their behalf".[75] Germany observed that the commentary to draft conclusion 4 "rightly noted that, where Member States had transferred exclusive competences to an international organization, the practice of the organization could be equated with the practice of those States".[76] The European Union, for its part, expressed its expectation that the Commission's output would reflect the potential of the organization to contribute to customary international law, including in such areas as fisheries and trade.[77]

37. In the view of several other States, further refinement of paragraph 2 and its commentary was needed. The Netherlands considered that the draft conclusion was too limited, explaining that while "international organizations can and do play ... a role in their own right [in the formation and identification of customary international law]", the current text "suggests a view of international organizations as mere agents of States ... and calls into question the idea of international legal personality of such organizations".[78] It suggested that the circumstances currently recognized in the commentary as those in which the practice of international organizations may be relevant, should be expanded.[79] Austria similarly found the present text of paragraph 2 to be "very restrictive", and explained that it "does not sufficiently reflect the growing participation of universal as well as regional [international organizations] in the international relations and therefore also in the formation of customary

[71] A/C.6/71/SR.21, para. 49. See also written comments of the United States, p. 5 (suggesting the deletion of the word "primarily" together with deletion of paragraph 2 of the conclusion).

[72] See, in addition to States referred to below, A/C.6/71/SR.20, para. 66 (China); A/C.6/71/SR.21, para. 99 (Chile); A/C.6/71/SR.22, para. 50 (Viet Nam).

[73] See A/C.6/71/SR.21, para. 63.

[74] Joint Nordic written comments, p. 1.

[75] *Ibid.*

[76] See A/C.6/71/SR.21, para. 116 (welcoming the specific reference to the European Union in that context).

[77] See A/C.6/71/SR.20, para. 45.

[78] Written comments of the Netherlands, paras. 2 and 4 (suggesting also, at para. 7, that the commentary should provide guidance as to "how to distinguish practice of the organization from practice of States within the organization").

[79] *Ibid.*

international law".[80] It suggested that the words "in certain cases" should be further elaborated so as to provide clearer guidance as to the situations in which the practice of international organizations "has an impact on the formation of customary international law".[81] Belarus considered that the only practice of international organizations that may be of relevance is "acts that relate to the practice of States acting within those organizations, mainly within their representative organs, not their secretariats, treaty bodies and the like".[82] It also suggested that including a definition of the term "international organization" may be useful.[83]

38. Other States, however, submitted that the text of paragraph 2 and the commentary was too broad. Australia, being "open to the possibility that the practice of international organizations might contribute to the formation of custom 'in certain cases'" as provided for in the draft conclusion, suggested that "[c]onsideration should be given to whether further caveats should be inserted".[84] Singapore suggested that the words "in certain cases" should be replaced by "in limited cases", in order to "more accurately reflect" the circumstances referred to in the commentary.[85] It further considered that the commentary should emphasize that "the reason the practice of [international organizations] can contribute to customary international law in such limited cases is that, in these cases, the practice of international organisations reflects the practice of States".[86] An amendment to the text of the conclusion was also proposed by Turkey, which suggested that "bearing in mind the need to set a high threshold [for] the evidentiary value of the practice of international organizations, a more cautious wording would be desirable, with the word 'contributes' being replaced by 'may contribute'".[87] Israel, too, considered that while the draft commentary "properly explains" the primary role of States and the more limited role of international organizations in the creation and expression of customary international law, the text of the draft conclusion itself does not adequately do so.[88] In particular, it

[80] Written comments of Austria, p. 1 (explaining that "[t]he activities of international organizations performed within their powers and attributable to them may be considered as practice having an impact on the formation of customary international law. They are carried out not only in areas of international law which only concern IOs, but also in relation to rules applicable to both international organizations and States where the activities of both have common features. Rules developed on the basis of such practice of IOs are not only applicable to international organizations but also to States. This applies for instance to operations of a military character").

[81] *Ibid.*

[82] Written comments of Belarus, p. 2 (adding, at p. 3, that "[r]egarding the practice of international organizations in the formation of customary international law, it would be more productive to take account of the activities of the States members of those organizations rather than the practice of the international organizations themselves, which are secondary subjects of international law"); see also A/C.6/71/SR.23, para. 3 (saying that "[t]he wording in [the commentary] concerning the functional equivalence of the acts of international organizations to the acts of States was appropriate, because acts of international organizations could be construed very broadly in the identification of 'practice' for the purposes of draft conclusion 4. [The delegation of Belarus] therefore proposed that the possibility of including that wording directly in the text of the draft conclusion should be considered").

[83] Written comments of Belarus, p. 2.

[84] See A/C.6/71/SR.21, para. 16 (also stressing that the role of international organizations in the formation of custom, including any assessment of the weight and relevance of their practice, "must be approached with caution").

[85] Written comments of Singapore, para. 6.

[86] *Ibid.*, at para. 7 (adding that such emphasis "would be consistent with the statement in draft conclusion 4, paragraph 1").

[87] See A/C.6/71/SR.29, para. 66 (adding that "that would also be more consistent with paragraphs 2 and 3 of draft conclusion 12").

[88] Written comments of Israel, para. 5 (referring in this context to draft conclusion 4 in particular, but also to the draft conclusions more generally).

suggested that the conclusion should make clearer those certain circumstances in which the practice of international organizations may be of relevance, namely, where exclusive competences were delegated to them by their member States and when the relevant rules relate to their internal operation or their relations with States.[89] Argentina thought that it would be useful to clarify whether the internal acts of international organizations could also be deemed relevant to the formation and identification of customary international law, opining that "they could not, as they were not international in character".[90] The Russian Federation had several reservations about paragraph 2, noting that the commentary "did not cite any practice or other sources as evidence that such practice could form rules of international law" and that "the authority of practice differed from one international organization to another".[91] It suggested that the draft conclusion "should be more limited to indicate that the practice of international organizations could contribute to the formation of rules of customary international law that applied to the organizations themselves and could under certain circumstances embody rules of customary international law".[92]

39. On the other hand, some States considered that to acknowledge any direct contribution of practice of international organizations to the formation and identification of customary international law was, in the words of the United States, "not supported by the practice or *opinio juris* of States or relevant case law", and was thus out of place in an instrument seeking to provide guidance as to the established rules regarding the identification of customary international law.[93] Considering that recognition of such a role for international organizations would be a "novel interpretation of international law that would implicitly and retroactively expand the [carefully negotiated] mandates of international organizations in [an] unclear way",[94] the United States further opined that even as a proposal for development of the law, paragraph 2 of draft conclusion 4 was couched in too broad a language and implied, erroneously, that any analysis of the existence of a rule of customary international law must involve examining the practice of international organizations.[95] The better approach, it was suggested, "is to recognize that it is the practice of States within

[89] *Ibid.*, at para. 6.

[90] See A/C.6/71/SR.22, para. 75.

[91] See A/C.6/71/SR.21, para. 49 (explaining that "United Nations practice, for example, could not be put on a par with the practice of regional organizations").

[92] *Ibid.*, at para. 50.

[93] See A/C.6/71/SR.20, paras. 56–57. In its written comments the United States was even more explicit: "The United States believes that draft conclusion 4 (Requirement of practice) is an inaccurate statement of the current state of the law to the extent that it suggests that the practice of entities other than States contributes to the formation of customary international law." (written comments of the United States, p. 2).

[94] Written comments of the United States, p. 4.

[95] See A/C.6/71/SR.20, para. 57. More specifically, the United States suggested that (a) "neither the Draft Conclusion nor the commentary fully defines what those cases [in which the practice of international organization may also contribute to the formation or expression of rules of customary international law] are", (b) they fail to address the "crucial question" of how one would determine the *opinio juris* of an international organization, (c) they fail to articulate the type of conduct that may be of relevance (given that "the forms of State practice discussed in Draft Conclusion 6 do not all have clear analogues in the activities of international organizations"), (d) they may erroneously lead to an interpretation according to which rules of customary international law may not be identified on the account of State practice alone or in the face of contradictory practice of international organizations, and (e) they fail specify the precise range of practice of international organizations that may be relevant to identifying a rule of customary international law, and erroneously imply that it is always necessary to analyse "not just State practice, but the practice of hundreds if not thousands of international organizations with widely varying competences and mandates" (written comments of the United States, pp. 3–5).

international organizations" that may be relevant, not the practice of the international organization as such.[96] Several suggestions for amending the conclusions and commentaries were made to reflect this position, including the deletion of paragraph 2 and specifying in paragraph 3 of the conclusion that international organizations are among those actors whose practice does not contribute to the formation or expression of customary international law.[97] It was also suggested that the words "of States" should be added to qualify the term "a general practice" in conclusion 2.[98] Mexico similarly suggested that the Commission should "[spell] out that the practice of international organizations contributed to the identification of the practice of their member States and not, as was currently the case, to the formation or expression of custom".[99] The Islamic Republic of Iran suggested that "the practice of States members of an international organization and that of the organization itself needed to be considered separately, and only the proven practice of States could be considered as evidence".[100] New Zealand, in considering that the current text of paragraph 2 of draft conclusion 4 goes "beyond the codification of settled law",[101] suggested that it "should be retained only if the 'certain circumstances' in which the practice of an international organization may contribute to the formation of customary international law are articulated more clearly in the text of the draft conclusion itself".[102] It suggested in this context that "the practice of an international organization cannot contribute to the formation of a rule of customary international law unless it is authorized by that organization's legal functions and powers; has been generally accepted over time by the organization's member States; and the rule of customary international law is one to which the international organization itself would be bound".[103] While recognizing "the particular situation of the European Union", New Zealand urged caution in "attempts to identify general conclusions from that limited experience" and advocated for a better articulation of the conceptual basis underpinning the draft conclusion.[104] It also highlighted the need clearly to align the text of paragraph 2, and its commentary, with the text and commentary of conclusion 12.[105]

40. While paragraph 3 of the draft conclusion, concerning the conduct of other actors, was generally endorsed,[106] Argentina suggested that it would be helpful to define the circumstances in which such conduct could be taken into consideration when assessing relevant practice.[107] China agreed that "[t]he conduct of entities that were not States or international organizations did not meet the requirement of practice and as such could not contribute to the formation or expression of customary international law", but considered it "doubtful whether an ambiguous phrase such as 'may be relevant' should be retained".[108] The Russian Federation was concerned that "[i]t was not entirely clear why, in addition to non-governmental organizations

[96] Written comments of the United States, p. 5.
[97] *Ibid.*, at pp. 5–6.
[98] *Ibid.*, at p. 5.
[99] See A/C.6/71/SR.22, para. 22 (adding that the "evidentiary value" of practice of international organizations was for identification of State practice and "lay solely in the performance of functions transferred by States or functionally equivalent to their own").
[100] See A/C.6/71/SR.23, para. 15.
[101] Written comments of New Zealand, para. 4.
[102] *Ibid.*, at para. 12.
[103] *Ibid.*
[104] *Ibid.*, at para. 9.
[105] *Ibid.*, at para. 11.
[106] See, for example, A/C.6/71/SR.21, para. 99 (Chile); A/C.6/71/SR.24, para. 16 (India); written comments of New Zealand, para. 13; written comments of Singapore, para. 5.
[107] See A/C.6/71/SR.22, para. 75.
[108] See A/C.6/71/SR.20, para. 66.

(NGOs) and private individuals playing an important ... role in the identification of rules of customary international law, reference was also made [in the commentary to paragraph 3] to non-State armed groups and transnational corporations".[109] It suggested, moreover, that a clarification should be added to the effect that "only the reaction of States to the behaviour of such actors was important".[110] Egypt expressed its "reservations about taking into account other sources, such as texts from academic institutions or non-State entities".[111]

2 *Suggestions by the Special Rapporteur*

41. The Special Rapporteur recognizes that the relevance of practice of international organizations to the identification of customary international law continues to be the subject of a range of strongly held views among States (and, it is believed, within the Commission). The Special Rapporteur also agrees with the view that several formulations presently found in draft conclusion 4 and its commentary could be improved. A great effort will be needed to achieve a text that meets the concerns of all sides.

42. Bearing in mind that all agree that it is the practice of States that has the paramount role in the creation and expression of rules of customary international law,[112] it would be useful to try and identify more clearly the scope of disagreement concerning the possible role of the practice of international organizations. First, it has not been disputed that when States direct an international organization to execute in their place actions falling within their own competences, such practice well may be of relevance to the creation, or expression, of customary international law. Thus the relevance of practice of the European Union (or other international organization) when exercising exclusive competences transferred to it by its member States was not denied,[113] as it seems clear that excluding such practice would preclude the member States themselves from contributing to the creation or expression of customary international law.[114] Conclusion 4 (and the conclusions more broadly) should not have this effect.

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[109] See A/C.6/71/SR.21, para. 51.

[110] *Ibid.*

[111] See A/C.6/71/SR.23, para. 41.

[112] The draft conclusions have indeed been viewed by commentators as enshrining a "State-centric approach" and as "reserving a residual role to IOs practice"; see, respectively, J. Odermatt, "The development of customary international law by international organizations", *International and Comparative Law Quarterly*, vol. 66 (2017), pp. 491–511 (in particular, pp. 493–497); and R. Deplano, "Assessing the role of resolutions in the ILC draft conclusions on identification of customary international law: substantive and methodological issues", *International Organizations Law Review*, vol. 14 (2017), pp. 227 and 233. It has also been thoughtfully argued that while the practice of international organizations may not be as important as that of States, the draft conclusions, both in substance and form, do not take international organizations "sufficiently seriously". Blokker, "International organizations and customary international law" (see footnote 22 above), at pp. 1–12.

[113] See, for example, written comments of New Zealand, para. 9 ("recogniz[ing] the particular situation of the European Union"); S.D. Murphy, "Identification of customary international law and other topics: the sixty-seventh session of the International Law Commission", *American Journal of International Law*, vol. 109 (2015), pp. 822 and 828 (suggesting that the reference to the European Union "may well be valid" (but adding that the organization "may not be exemplary of international organizations generally").

[114] See also the third report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/682), para. 77, and the fourth report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/695), para. 20.

43. Second, no opposition was expressed as regards the proposition that the practice of international organizations among themselves and in their relations with States could give rise or attest to rules of customary international law binding in such relations. This position may be said to be reflected in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which refers in its preamble to the "codification and progressive development of the rules relating to treaties between States and international organizations or between international organizations", and which affirms (also in the preamble) that "rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention".[115] It will be recalled in this context that the Secretariat memorandum of 2013 included the observation that "[u]nder certain circumstances, the practice of international organizations has been relied upon by the Commission to identify the existence of a rule of customary international law. Such reliance has related to a variety of aspects of the practice of international organizations, such as their external relations, the exercise of their functions, as well as positions adopted by their organs with respect to specific situations or general matters of international relations".[116]

44. Third, and more generally, there does not seem to be disagreement as to the notion that a wide array of acts carried out by international organizations may in fact be relevant and helpful in seeking to identify rules of customary international law. For example, in identifying the existence and content of an alleged rules of customary international law applicable in relation to peacekeeping operations, the experience of forces deployed by the United Nations or by organizations such as the Economic Community of West African States may need to be taken into account. Similarly, an exercise to determine whether customary international law recognizes an exception to governmental succession to debts in cases of so-called "odious debt" should not overlook the practice of international financial institutions such as the World Bank or the International Monetary Fund. A divergence of views appears to exist, however, on whether such practice merely shows what the member States do in or through the relevant organization, or whether it is practice of the organization as such. While the matter may at the end of the day seem largely theoretical, the separate international legal personality of international organizations suggests that the latter classification ought to prevail. Even where the member States are those who may ultimately authorize and direct such practice as deployment of peacekeepers or the conditions for repayment of loans, it is the organization that acts. In other words, international organizations do act on the behalf of their members States; but in so doing they are actors in their own right. The example of the European Bank for Reconstruction and Development's Standard Terms and Conditions for a loan, guarantee or other financing agreement may be recalled: these recognize that the sources of public international law that may be applicable in the event of dispute between the Bank and a party to a financing agreement include, *inter alia*, "forms of international custom,

[115] See also article 38 of the Convention. The Commission was indeed conscious not to close the door on such a possibility: see summary record of the Commission's 1442nd meeting (16 June 1977), *Yearbook ... 1977*, vol. I, pp. 145–146; *Yearbook ... 1978*, vol. II (Part Two), p. 137, para. (5); *Yearbook ... 1982*, vol. II (Part Two), p. 48, para. (5).

[116] A/CN.4/659, "Formation and evidence of customary international law: elements in the previous work of the International Law Commission that could be particularly relevant to the topic" (2013), observation 13.

including the practice of states *and international financial institutions* of such generality, consistency and duration as to create legal obligations".[117]

45. The question of how to establish acceptance as law (*opinio juris*) on the part of international organizations does not seem to raise special difficulties. The forms of evidence referred to in conclusion 10 may well apply, *mutatis mutandis*, to international organizations.[118] Statements of senior officials of the organization, legal opinions by the general counsel of the organization, correspondence of the organization with its member States (or others), acceptance by the organization of treaty provisions explicitly incorporating rules of customary international law, or official publications of an organization, may attest to the *opinio juris* of the organization. A recent example may be found in the Joint Statement submitted to the United Nations Legal Counsel on 31 January 2017 by some 24 international organizations, in which the signatories expressed their view, *inter alia*, on the legal status of the rules contained in the Commission's draft articles on the responsibility of international organizations.[119]

46. At the same time, the Special Rapporteur accepts that several improvements could be made to the text of draft conclusion 4 in order better to reflect the actual position and address the concerns raised. In order to highlight the primacy of State practice in the present context while also recognizing that there may be cases where the practice of international organizations may be of relevance, several amendments to paragraphs 1 and 2 are suggested. In particular, the words "primarily" and "contributes to" could be omitted from paragraph 1, to strengthen the general proposition contained therein.[120] In paragraph 2, the word "may" should be added to emphasize that caution is needed. For clarity, the reference therein to "rules of customary international law" should be made in the singular, to better indicate that the practice of international organization would not always be relevant. It is also suggested to replace (in both paragraphs) the words "formation, or expression" with the words "expressive, or creative", which were employed by the International Court of Justice in the *Continental Shelf (Tunisia Libyan Arab Jamahiriya)* case.[121] Referring first to expression and then to creation would also serve to focus the paragraph on the task of identification of a rule, which better corresponds to the aim of the topic as a whole.

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[117] European Bank for Reconstruction and Development, Standard Terms and Conditions (1 December 2012), sect. 8.04(b)(vi)(C) (emphasis added). See also the fourth report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/695), footnote 19.

[118] See also Odermatt, "The development of customary international law by international organizations" (footnote 112 above), at p. 493.

[119] "Response to the request of the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel of February 8, 2016, for comments and information relating to the draft articles on the responsibility of international organizations pursuant to UN General Assembly resolution 69/126 (2014)", available online at http://opil.ouplaw.com/view/10.1093/law-oxio/e204.013.1/law-oxio-e204-regGroup-1-law-oxio-e204-source.pdf.

[120] It would not seem advisable to add to conclusion 2 the words "of States" to the now century-old formula of "a general practice accepted as law", also as this would stray unnecessarily from the widely accepted and usefully flexible language of the Statute of the International Court of Justice.

[121] *Continental Shelf (Tunisia Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 46, para. 43 ("... it should be borne in mind that, as the Court itself made clear in that [1969] Judgment, it was engaged in an analysis of the concepts and principles which in its view underlay the actual practice of States which is expressive, or creative, of customary rules").

47. Paragraphs 1 and 2 could thus read:

> 1. *The requirement of a general practice, as a constituent element of customary international law, refers to the practice of States as expressive, or creative, of rules of customary international law.*
>
> 2. *In certain cases, the practice of international organizations may also contribute to the expression, or creation, of a rule of customary international law.*

48. The commentary would need to be revised accordingly. In referring to the practice of international organizations, it could begin by explaining briefly that international organizations are different from States and that, in the words of the International Court of Justice, "they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them".[122] The commentary could then explain that while international organizations often serve as arenas, or catalysts, for State practice, at times it is their own practice, in fulfilment of their mandates from States, which could be of relevance. This may be the case when they exercise on the international plane exclusive competences or other powers conferred upon them. It would be clarified that the conclusion does not suggest that every analysis of the existence of a rule of customary international law necessitates an examination of the practice of international organizations; it is only where the practice of particular organizations may be directly relevant, mostly by virtue of their mandate and constituent instrument, that it should be considered. It would also be explained that the weight to be given to the practice on an international organization should depend on a number of factors, including the extent of the organization's membership and the input and reaction of the member States to that practice. The commentary may further explain that the practice of international organizations may be of particular relevance when determining the existence and content of customary rules applying to the organizations themselves. It should also include a general sentence, similar to the one found in the draft commentary at present,[123] explaining that references in the conclusions and commentaries to the practice (and *opinio juris*) of States should be read as including, in those cases where it is relevant, the practice (and *opinio juris*) of international organizations. In this way, the conclusions themselves, by referring mostly to States, will reflect the predominance of State practice in the present context, but at the same time leave room for consideration of practice of international organizations in those fields and cases where it may be relevant.

49. As for paragraph 3 of the conclusion, it is suggested that, for the sake of consistency, the word "formation" would be substituted with "creation" (and relocated within the sentence) as well. The commentary would need to address the concerns raised, in particular by clarifying further that "other actors" have no direct role in the creation or expression of rules of customary international law, and the circumstances in which their conduct could be taken into consideration when assessing relevant practice. Any reference to non-State armed groups and transnational corporations would need to be considered as well.

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[122] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 78, para. 25 (referring to the "principle of speciality" that governs international organizations). The Special Rapporteur recalls that his proposal to include in the conclusions a definition of "international organization" (see the second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672), para. 20) was not favoured by the Commission; the commentary does include such a definition (A/71/10, para. 63, para. (3) of the commentary to conclusion 4).

[123] See A/71/10, para. 63, para. (3) of the commentary to conclusion 4.

Conclusion 5: Conduct of the State as State practice

1 Comments and observations received

50. Draft conclusion 5 elicited few comments. In endorsing the wording of the conclusion, Chile expressed agreement with the commentary's clarification that "to qualify, the practice must be publicly available or at least known to other States".[124] Spain similarly suggested that the commentary should indeed "make it clear that practice must be publicly available or at least known to other States in order to give them the opportunity to object".[125] The United States, however, considered that "[t]he fact that the practice might not otherwise be "publicly available" or known to some would not ... preclude its relevance to the formation and identification of customary international law", and suggested that the relevant sentence in the commentary be deleted or revised.[126] Belarus suggested that the commentary could perhaps incorporate the approach to attribution of conduct to the State employed in the Commission's articles on State responsibility.[127]

2 Suggestions by the Special Rapporteur

51. The Special Rapporteur does not suggest any changes to draft conclusion 5, as adopted on first reading. A revision to the commentary may be suggested to capture more accurately the significance of the availability of practice for the formation and (perhaps more importantly) identification of customary international law. It may be recalled that reference to the concept of attribution as set out in the Commission's articles on responsibility of States for internationally wrongful acts was found (following a debate on the matter in the Drafting Committee) to be inappropriate in the present context.[128]

Conclusion 6: Forms of practice

1 Comments and observations received

52. Draft conclusion 6, while generally welcomed, attracted a number of comments concerning both drafting and substance. The Russian Federation, accepting that the practice of different State bodies and branches of Government may all be considered as State practice for purposes of customary international law, "was not convinced that there was no predetermined hierarchy" among such various forms of practice.[129] Recognizing that the commentary did point out that such a hierarchy could in fact exist in certain cases, it suggested a more general statement to the effect that "a hierarchy existed in the vertical power structure (the higher body had more importance than the lower one) and as a function of the role of the body concerned: the practice on the international scene of representatives of executive bodies was more important than the practice of bodies having responsibility primarily in the area of a State's internal affairs".[130] Slovakia, by contrast, considered that "there should be no hierarchy between the different forms of evidence of the two elements".[131] It also

[124] See A/C.6/71/SR.21, para. 99.
[125] *Ibid.*, para. 106.
[126] Written comments of the United States, p. 9.
[127] See A/C.6/71/SR.23, para. 4.
[128] Statement of the Chairman of the Drafting Committee (7 August 2014), p. 10 (available at http://legal.un.org/ilc/); see also the second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672), footnote 74 and the references therein.
[129] See A/C.6/71/SR.21, para. 52.
[130] *Ibid.*
[131] See A/C.6/71/SR.23, para. 24.

"welcomed the fact that the enumeration of different forms of practice and *opinio juris* was not exhaustive, but demonstrative, leaving space for the analysis of new forms in the future".[132] The United States agreed that "State practice comes in a ... variety of forms as stated in draft conclusion 6", but considered that the examples of forms of State practice in paragraph 2 of the conclusion should be reordered so as "to start with more action-oriented practice as it is frequently the most probative form of practice".[133] It made specific suggestions to this effect, adding that such reordering "may also help the reader distinguish between practice and *opinio juris*, as statements are more likely to embody the latter".[134] The United States also suggested that the word "may" be added to the second sentence of paragraph 1, "both for consistency with the first and third sentences (both of which use "may") and to underscore that each State act must be assessed to determine whether it is relevant practice for the purposes of a given customary international law analysis".[135] Israel considered that the reference to verbal acts as a form of practice should be qualified by the words "at times"; and suggested that the commentary should make clear that "casual" or "spontaneous" statements made by State officials "are insufficient for the purposes of identification of customary international law and should not be given any weight in this regard".[136] Austria suggested that conclusion 6 (as well as conclusions 7 and 8) should also cover the practice of international organizations.[137]

53. All States commenting on the issue of inaction as a form of State practice emphasized that inaction may only be considered as practice when it is deliberate.[138] Chile suggested in this context that draft conclusion 6 "must be read in conjunction with the commentary so as to ensure a proper understanding" that "[f]or the inaction of a State to constitute a practice, i.e. an element of custom, it must be a deliberate act of the State, conducted in full awareness and intentionally for that sole purpose".[139] Ireland, too, welcomed the "note of caution sounded in the commentary" to this effect,[140] and the United States proposed several amendments to its text to further "underscore the limited circumstances in which inaction constitutes relevant State practice".[141] A number of other States, however, suggested that the text of conclusion 6 itself should explicitly refer to deliberate inaction.[142]

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[132] *Ibid.*

[133] Written comments of the United States, pp. 11–12 (suggesting the following order: "executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; decisions of national courts; diplomatic acts and correspondence; conduct in connection with treaties; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference").

[134] *Ibid.*, at p. 11.

[135] *Ibid.*

[136] Written comments of Israel, para. 34 (explaining that "customary international law overwhelmingly regulates physical acts, whereas customary regulation of verbal conduct is rare"); and paras. 26–27.

[137] Written comments of Austria, p. 1.

[138] See, for example, in addition to States referred to in the present paragraph, A/C.6/71/SR.22, para. 7 (Greece) and para. 24 (Mexico).

[139] See A/C.6/71/SR.21, para. 100.

[140] See A/C.6/71/SR.22, para. 34.

[141] Written comments of the United States, p. 10.

[142] See A/C.6/71/SR.21, para. 27 (El Salvador, suggesting also that this should be done in a "specific paragraph on inaction"); A/C.6/71/SR.22, para. 24 (Mexico) and para. 75 (Argentina); written comments of Singapore, para. 10 (adding that the Commission "may wish to consider replacing the expression 'inaction' with 'deliberate abstention from acting'"); written comments of New Zealand, para. 16; written comments of Israel, para. 11; written comments of the Netherlands, para. 9.

54. With regard to the draft conclusion's reference to decisions of national courts, New Zealand considered that in general "only decisions of higher courts would be sufficient to be considered to be State practice for the purposes of the formation or identification of rules of customary international law", adding that "it is very difficult to imagine a situation in which a decision that has been overruled by a higher court could still be relied upon as State practice in this context".[143] Israel similarly suggested that the conclusion and commentary should clarify that "acts (laws, judgments, etc.) must be final and conclusive in order to qualify" as relevant, so as not to imply "that non-definitive acts (such as bills and provisional measures) could possibly point to the existence of customary international law".[144] More specifically, it considered that "only higher courts' final and definitive decisions ... should be taken into account", and that "statements of States' representatives should be attributed to the State only if they were properly authorized and made in an official capacity".[145] Australia, on the other hand, considered that "[t]he Commission's approach of regarding national court decisions as a form of State practice, a form of evidence of acceptance as law and potentially as a 'subsidiary means' for determining the existence of a customary rule was appropriately reflected in draft conclusions 6, 10, and 13".[146] Greece suggested that the commentary should clarify further the distinction between national court decisions as a form of State practice and their possible role as subsidiary means for determining the law, as such distinction was "not obvious and was difficult to implement in practice".[147] Viet Nam made a similar suggestion.[148]

2. Suggestions by the Special Rapporteur

55. The Commission may wish to take account of the concerns of many States that there should be greater clarity about the circumstances in which inaction amounts to practice. This could be done by omitting from paragraph 1 the words "in certain circumstances" and specifying instead that the inaction must be "deliberate". That would be consistent with the present commentary, which states expressly that "[t]he words 'under certain circumstances' seek to caution, however, that only deliberate abstention from acting may [count as practice]".[149] It is also proposed that paragraph 1 could be improved by joining the second and third sentences. In light of the various suggestions made, the paragraph might read:

> *Practice may take a wide range of forms. It may include both physical and verbal acts, as well as deliberate inaction.*

56. The Special Rapporteur does not consider that only decisions of higher courts may be State practice. Such an approach would overlook how a State (and its judiciary) may operate.[150] For example, the parties (which will not necessarily include

[143] Written comments of New Zealand, para. 18.
[144] Written comments of Israel, para. 20.
[145] *Ibid.*, at paras. 24 and 27.
[146] See A/C.6/71/SR.21, para. 19.
[147] See A/C.6/71/SR.22, para. 9.
[148] *Ibid.*, para. 51.
[149] See A/71/10, para. 63, para. (3) of the commentary to conclusion 6.
[150] In the *Jurisdictional Immunities of the State* case, the International Court of Justice took note of judgments by lower courts in Belgium as part of its inquiry into State practice in the form of national judicial decisions which concerned the question whether a State was entitled to immunity in proceedings concerning acts allegedly committed by its armed forces in the course of an armed conflict: *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 133, para. 74.

the State) may decide not to appeal a lower court decision for any number of reasons, even when they disagree with it, while a higher court might have the discretionary authority to decline hearing an appeal when the higher court agrees with the lower court ruling. At the same time, it seems clear that decisions of higher courts should in general be accorded greater weight; and where a lower court decision has been overruled by a higher court on the relevant point, the evidentiary value of the former is likely to be nullified. Such circumstances pertaining to the question of whether a certain practice reflects the position of a State may well be taken into account, as recognized — indeed required — by conclusions 3 and 7. The text of the commentary to conclusion 6, which currently specifies that "it is likely that greater weight will be given to the higher courts" and that "decisions that have been overruled on the particular point are unlikely to be considered relevant", could be sharpened. In addition, while the commentary already refers to the possible dual role of decisions of national courts,[151] further guidance on this matter could be included.

57. As for the order in which possible forms of practice are listed in paragraph 2, the present text reflects a deliberate choice by the Drafting Committee, which debated the matter and elected to amend the text originally proposed by the Special Rapporteur in order to enumerate "first, common forms of practice at the international level and then forms of practice at the domestic level".[152] The Commission may wish to reconsider this, in order to list first the most classic forms of practice. In any event, the forms of practice listed could well apply, *mutatis mutandis*, to international organizations.

58. Paragraph 3 of the conclusion states that there is no predetermined hierarchy among the various forms of practice. The paragraph is intended to explain that in the abstract, no form of practice has a higher probative value than any other and all may be of relevance. It was included by the Drafting Committee to indicate, *inter alia*, that the order in which forms of practice are listed in paragraph 2 "does not imply that a specific form of practice is *a priori* more important than the other".[153] As the Chairperson of the Drafting Committee noted, paragraph 3 "does not imply, however, that all forms of State practice necessarily carry the same weight. The word "predetermined" indicates that if such a hierarchy exists, it needs to be assessed on a case-by-case basis".[154] The question of which forms of practice should be awarded greater weight in a particular case is a matter addressed by conclusion 3 (as well as by conclusion 7), the commentary to which recognizes that "the practice of the executive branch is often the most relevant on the international plane".[155] The Commission may wish to consider whether paragraph 3 should be retained, or whether the clarification would fit better in the commentary.

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[151] See A/71/10, para. 63, para. (6) of the commentary to conclusion 6.

[152] See Statement of the Chairman of the Drafting Committee (7 August 2014), pp. 13–14, available at http://legal.un.org/ilc/ (adding that "[t]he order in which the forms are listed is not significant ... [it] was chosen only as a matter of drafting and does not imply that a specific form of practice is a priori more important than the other"); for the Special Rapporteur's proposal see the second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672), para. 48.

[153] Statement of the Chairman of the Drafting Committee (7 August 2014), p. 14 (available at http://legal.un.org/ilc/).

[154] *Ibid.* The commentary to conclusion 6 specifies in connection with paragraph 3 that "[i]n particular cases, however, as explained in the commentaries to draft conclusions 3 and 7, it may be that different forms (or instances) of practice ought to be given different weight when they are assessed in context" (A/71/10, para. 63, para. (7) of the commentary to conclusion 6).

[155] *Ibid.*, para. (5) of the commentary to conclusion 7.

Conclusion 7: Assessing a State's practice

1. Comments and observations received

59. Draft conclusion 7 did not attract many comments. The United States expressed concern that paragraph 2 "could be misread to suggest that States with varying practice are afforded less weight relative to the practice of other States under customary international law" and could therefore be at odds with the principle of sovereign equality of States.[156] It suggested that it would be more accurate to consider that "[a] State with varying practice might not support an asserted rule to the same degree as a State whose practice consistently supports the rule", and that the text of the draft conclusion should be amended accordingly.[157] Israel remarked that draft conclusion 7 failed to capture the fact that "variations in practice often [simply] indicated that the State did not see itself bound to act in any particular way".[158] It suggested that paragraph 2 either be deleted, or amended to say that in case of inconsistent practice by a State, the weight to be given to the practice would depend on the circumstances.[159] The Russian Federation suggested that the practice of State organs had different weight for the purpose of the identification of customary international law (the practice of the executive branch taking precedence on the international plane), and thus, in principle, not all variations in the practice of a State weakened its importance.[160] The Netherlands noted the importance of taking into account materials in languages other than the "mainstream" ones when assessing the practice of a State.[161]

2. Suggestions by the Special Rapporteur

60. Conclusion 7 sets out important guidance for the assessment of the practice of a particular State.[162] Paragraph 1 states that account is to be taken of all available practice of a State, which is then to be assessed as a whole in order to determine the actual position of the State with regard to an alleged rule of customary international law. This proposition, which finds support in the jurisprudence of the International Court of Justice,[163] did not meet with opposition. Paragraph 2 provides that where the practice of a State varies, "the weight to be given to that practice may be reduced". This is meant to offer guidance in situations in which the evidence reveals ambivalence on the part of a particular State in that different organs of that State, or the same organ over time, display differing positions with regard to the alleged rule.

61. As the Chairperson of the Drafting Committee explained in 2014, "[t]he use of the word "may" [in paragraph 2 of conclusion 7] means that this issue ... needs to be approached with caution, since such a consequence [of the weight given to a State's practice being reduced] is not necessarily to be drawn in all cases".[164] The word

[156] Written comments of the United States, p. 12.

[157] *Ibid.*, at pp. 12–13.

[158] See A/C.6/71/SR.22, para. 39.

[159] Written comments of Israel (2018), para. 36 (suggesting also a corresponding change to the commentary).

[160] See A/C.6/71/SR.21, para. 52.

[161] *Ibid.*, para. 130.

[162] See also the statement of the Chairman of the Drafting Committee (7 August 2014), p. 14 (available at http://legal.un.org/ilc/).

[163] See the second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672), para. 50.

[164] Statement of the Chairman of the Drafting Committee (7 August 2014), p. 15 (available at http://legal.un.org/ilc/).

"may", which was not included in the Special Rapporteur's original proposal for this draft conclusion, was indeed introduced precisely to meet the comments of members of the Commission concerning a possible hierarchy of forms of practice and conflicting practice within the same State. The draft commentary, too, indicates that the "assessment needs to be approached with caution, and the same conclusion would not necessarily be drawn in all cases ... for example, a difference in the practice of lower and higher organs of the same State is unlikely to result in less weight being given to the practice of the higher organ ... practice of organs of a central government will often be more significant than that of constituent units of a federal State or political subdivisions of the State; and the practice of the executive branch is often the most relevant on the international plane, though account may need to be taken of the constitutional position of the various organs in question".[165] The commentary also refers to the *Fisheries case*, the specific circumstances of which led the International Court of Justice to find that "too much importance need not be attached to the few uncertainties or contradictions, real or apparent ... in Norwegian practice".[166] This explanation provided in the commentary was welcomed by Germany, since it clarified that not all observed inconsistencies in the practice of a State's organs ought to result in reducing the weight given to that State's practice.[167]

62. The Special Rapporteur accepts that the text of paragraph 2 could be improved to convey more clearly the need for caution in those situations that it is meant to cover, and thus to meet the concerns raised. He suggests that conclusion 7, paragraph 2 be amended to read:

> *Where the practice of a particular State varies, the weight to be given to that practice may, depending on the circumstances, be reduced.*

Corresponding changes to the commentary will be suggested in due course.

Conclusion 8: The practice must be general

1. Comments and observations received

63. Draft conclusion 8 received general approval, though a number of amendments to its text and commentary were suggested. The Russian Federation considered that the term "'[g]eneral practice' might be too lightweight", and expressed its preference for the term "settled practice" that was employed in the *North Sea Continental Shelf* judgment.[168] It also indicated a preference for the phrase "both extensive and virtually uniform" in place of the words "sufficiently widespread and representative".[169] The United States also suggested that conclusion 8 should incorporate the "extensive and virtually uniform" standard, "as it is widely recognized by States as the threshold that generally must be met to demonstrate the existence of a customary rule".[170] The United States considered that the word "sufficiently" in paragraph 1 of the draft conclusion was inadequate as it failed to define clearly "the quantum and quality of State practice that is required to identify a rule of customary international law".[171] Israel suggested that the commentary should refer to the requirement that the practice

[165] See A/71/10, para. 63, para. (5) of the commentary to conclusion 7.

[166] *Ibid.* (including also the observation of the Court that such uncertainties or contradictions "may be easily understood in the light of the variety of facts and conditions prevailing in the long period").

[167] See A/C.6/71/SR.21, para. 117.

[168] *Ibid.*, para. 48.

[169] *Ibid.*, para. 53.

[170] Written comments of the United States, p. 13.

[171] *Ibid.* (adding that "indeed, it begs the question of what degree of widespread and representative practice is 'sufficient' to meet the standard").

be "virtually uniform" and make clear that "States taking part in the practice ... must be significantly and decisively greater than those not engaging in such practice".[172]

64. The absence of an explicit reference to "specially affected States" was criticized by a number of States. China considered it appropriate that the commentaries to draft conclusions 8 and 9 be expanded so as to "emphasize that the practice and *opinio juris* of 'specially affected States' should be given fuller consideration".[173] It pointed to the jurisprudence of the International Court of Justice in this regard, and explained that "[t]he practice of any country, whether it be big or small, rich or poor, or strong or weak, should receive full consideration, provided that that country has a concrete interest in and actual influence over the formation of rules in a specific arena. As 'specially affected States', such countries can play a role in the formulation of rules of customary international law".[174] The Netherlands considered that reference to specially affected States should be included in conclusions 8 and 9 themselves, and not only in the commentary (where the term should nevertheless be "further elucidated").[175] Referring to the *North Sea Continental Shelf* judgment, it proposed that the draft conclusions should make clear "that practice and *opinio juris* of such States is an indispensable element in identifying the existence of a rule of customary international law" and "must be given greater weight than that of other States".[176] The United States similarly considered that "the important role of specially affected States should be addressed in [conclusion 8] itself", explaining that "[a] requirement that the practice of specially affected States be considered is an integral part of the *North Sea Continental Shelf* standard".[177] It further noted its concern that as currently worded, the conclusions and commentary may lead to confusion in this respect.[178] Israel likewise suggested that specially affected States "are crucial to the formation and, accordingly, the identification of customary rules",[179] and that their practice (and *opinio juris*) is not only "an indispensable element of identifying the existence of a customary international rule, but ... must be given significantly greater weight than the practice of other States".[180] It proposed that the text and commentary of draft conclusion 8 (as well as draft conclusion 9) should be amended to emphasize this.[181]

65. The United States further suggested that conclusion 8 should "explicitly acknowledge that the practice of States that does not support a purported rule is to be considered in assessing whether that rule is customary international law", noting that it is critical that such practice be given sufficient weight.[182]

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[172] Written comments of Israel, para. 29.

[173] Written comments of China, p. 2.

[174] *Ibid.*

[175] Written comments of the Netherlands, paras. 10–11.

[176] *Ibid.*

[177] Written comments of the United States, p. 13.

[178] *Ibid.* (suggesting that "the draft conclusions and commentary may lead to confusion by defining what it means for practice to be 'general' in the draft conclusion with no reference to specially affected States, but then suggesting their practice is 'an important factor' in paragraph (4) of the commentary and only using the term 'specially affected' in a footnote").

[179] Written comments of Israel, para. 29 (adding that "[i]n cases in which the accumulation of practice and *opinio juris* of specially affected States is not in line with the proposed rule, or does not exists *vis-à-vis* such a rule ... this should serve as evidence that no such rule exists. This approach is also reflected in paragraph 74 of the International Court of Justice judgment on the *North Sea Continental Shelf* case").

[180] *Ibid.*

[181] *Ibid.*, at para. 30.

[182] Written comments of the United States, pp. 13–14.

2. Suggestions by the Special Rapporteur

66. The term "general practice" is found in Article 38, paragraph 1 (*b*) of the Statute of the International Court of Justice, and is commonly used to refer to the "material" (or "objective") element of customary international law. It is also used elsewhere in the draft conclusions,[183] and throughout the commentary adopted on first reading. The Special Rapporteur considers that it should be retained in conclusion 8.

67. As for explaining more clearly what is meant in this context by "general" — that "fundamental adjective qualifying practice in the context of the determination of the existence and content of a rule of customary international law"[184] — as conclusion 8 seeks to do, the Special Rapporteur would recall that the current language of the conclusion was "inspired by the jurisprudence of the International Court of Justice [and] reflects the flexibility of customary international law and the situations in which it arises".[185] The phrase "extensive and virtually uniform", employed in the *North Sea Continental Shelf* judgment,[186] is only one of the ways in which the Court has referred to the requirement of a general practice; in that same case it also used the term "a settled practice"[187] as well as the words "very widespread and representative".[188] In other cases it has applied the requirement of a general practice to mean practice that is "in general ... consistent";[189] "established and substantial";[190] "uniform and widespread";[191] or "constant and uniform".[192]

68. None of these expressions define the exact quantum and quality of practice that is required for the identification of any specific rule of customary international law. They cannot and, indeed, do not attempt to do so. The qualification afforded by the word "sufficiently" may thus play an important role in providing further guidance as to how generality of practice should be assessed in a particular case.[193] It has featured in the judgments of the International Court of Justice and other courts in this precise

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[183] The term "general practice" also appears in conclusions 2, 3, 4, 9, 11, 12 and 16.

[184] Statement of the Chairman of the Drafting Committee (7 August 2014), p. 16 (available at http://legal.un.org/ilc/).

[185] *Ibid.*

[186] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43, para. 74.

[187] *Ibid.*, at p. 44, para. 77 and p. 45, para. 79. See also *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 122, para. 55.

[188] *Ibid.*, at p. 42, para. 73 (referring specifically to "the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law").

[189] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 98, para. 186.

[190] *Ibid.*, at p. 106, para. 202.

[191] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 40, at p. 102, para. 205.

[192] *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 277; *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 40.

[193] The Chairman of the Drafting Committee explained in 2014 that "[t]he number of States whose practice is required may vary from case to case, a reality that is encapsulated by the word 'sufficiently'. Practice also needs to be followed by a sufficiently representative group of States, usually in different regions. The precise representativeness required also depends on the rule in question and this condition is also to be examined with some flexibility": statement of the Chairman of the Drafting Committee (7 August 2014), p. 16 (available at http://legal.un.org/ilc/).

context.[194] It may be particularly helpful in highlighting that a certain practice must be general enough to give rise to or express a rule of customary international law, and also in providing for some measure of flexibility reflecting the inherent nature of this source of international law.

69. The Commission may wish to consider whether the expression "virtually uniform" may capture that aspect of generality more accurately than the word "consistent". The Special Rapporteur suggests that conclusion 8, paragraph 1 be amended to read:

> *The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as virtually uniform.*

70. As for "specially affected States", the Special Rapporteur recalls that his second report suggested that "[d]ue regard should be given to the practice of 'States whose interests [are] specially affected', where such States may be identified".[195] It also contained a draft paragraph to that effect.[196] This was well received by several members of the Commission in the plenary debate in 2014, but attracted criticism from others. As the Special Rapporteur explained that year, some of that criticism "had not been entirely warranted. Some members had apparently misunderstood what was intended by that [proposed] provision, which reflected the case law of the International Court of Justice. He had certainly not intended to suggest that the practice of certain 'Great Powers', or of the permanent members of the Security Council, should be deemed essential for the formation of a rule of customary international law. He had thought that the explanation supplied in [the report] would be sufficient to clarify the meaning of that provision, especially as it was not couched in peremptory language ... and as the category of States, those 'whose interests are specially affected', varied from rule to rule and by no means included any particular State".[197] In other words, the importance of the notion of "specially affected states" for the identification of customary international law should not be overstated. It does not imply that one *only* looks at the practice of specially affected states, as some seemed to fear; it simply means that their practice had to be taken into account. Given that the present language of conclusion 8 is understood to include this element, the Special Rapporteur suggests that the Commission seek to take account of the concerns expressed by adjusting the commentary.

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[194] See, for example, *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 42, para. 73 and p. 45, para. 79; *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 299, para. 111; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 98, para. 186 and p. 108, para. 205; *2 BvR 1506/03* (German Federal Constitutional Court), Order of the Second Senate of 5 November 2003, para. 59 ("Such practice, however, is not sufficiently widespread as to be regarded as consolidated practice that creates customary international law"). See also the second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672), paras. 52–53, in particular footnote 154.

[195] *Ibid.*, para. 54 (adding that "[i]n other words, any assessment of international practice ought to take into account the practice of those States that are 'affected or interested to a higher degree than other [S]tates' with regard to the rule in question, and such practice should weigh heavily (to the extent that, in appropriate circumstances, it may prevent a rule from emerging)".

[196] *Ibid.*, para. 59 (it was suggested that a conclusion dealing with generality of practice should include a paragraph stating that "[i]n assessing practice, due regard is to be given to the practice of States whose interests are specially affected").

[197] A/CN.4/SR.3227, provisional summary record of the Commission's 3227th meeting (18 July 2014), p. 5 (summarizing the plenary debate).

71. It also seems clear to the Special Rapporteur that any inquiry into whether a general practice exists needs to take into account and examine contradictory or inconsistent practice, "particularly emanating from these very States which are said to be following or establishing the [alleged] custom".[198] A clarification to this effect could be made in the commentary.

Part Four: Accepted as law (*opinio juris*)

Conclusion 9: Requirement of acceptance as law (*opinio juris*)

1 Comments and observations received

72. A number of States expressed their appreciation for "the elaborated comments on the nature ... of the second constituent element", acceptance as law, including the clear distinction between the latter and "extralegal motives for action or inaction, such as comity, political expedience or convenience, by means of a thorough analysis of context".[199] Austria, on the other hand, suggested that the commentary should address "the significance of the second aspect of the subjective constitutive element of customary international law, the *opinio necessitatis*", noting that "[d]octrine has shown that certain, otherwise unlawful conduct of states was considered to be politically, economically or morally necessary".[200] Sudan wished to emphasize that "the principle of *opinio juris* must take into consideration all parts of the world and all the legal systems in force".[201] Several other States thought that the significance of acceptance as law by specially affected States should be explicitly referred to. See para. 64 above.[202]

73. The United States suggested that the word "with" in the definition of acceptance as law provided in paragraph 1 ("the practice in question must be undertaken with a sense of legal right or obligation") be replaced by the words "out of".[203] This amendment, it was explained, would "more clearly [convey] that the entirety of the practice must be out of a sense of legal obligation".[204] In addition, while agreeing "in principle, that international law recognizes that States have certain rights", the United States suggested that the express reference to the concept of a legal right in the definition of acceptance as law should be omitted.[205] It explained that referring to "legal right" was unnecessary because "States have generally understood the phrase undertaken out of 'a sense of legal obligation' to encompass, where appropriate, State practice undertaken out of a sense of legal right or obligation";[206] and that it was also potentially confusing, "by suggesting that the same inquiry into State practice and *opinio juris* to identify whether States *must* act in a certain way is also needed to

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[198] To borrow the words of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda in their Separate Opinion in *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 50, para. 16.

[199] See, respectively, joint Nordic written comments, p. 1, and A/C.6/71/SR.20, para. 51 (Finland on behalf of the Nordic countries).

[200] Written comments of Austria, p. 2.

[201] See A/C.6/71/SR.21, para. 138.

[202] See para. 64 above.

[203] Written comments of the United States, p. 7.

[204] *Ibid.*

[205] *Ibid.*, at pp. 7–8.

[206] *Ibid.*, at p. 7 (further explaining that "[a]dding 'right or' to the draft conclusion risks creating the misimpression that the concept of legal rights is not already contemplated in the phrase 'a sense of legal obligation'").

ascertain whether States *may* act".[207] It was thus suggested that conclusion 9 should retain only the "common formulation" referring to legal obligation alone, and that the commentary should provide the above-mentioned clarifications.[208] Other States, however, expressed no reservations with regard to the definition provided in draft conclusion 9, and India, for example, "agreed with the Commission that practice that was accepted as law (*opinio juris*) must be undertaken with a sense of legal right or obligation".[209]

2. Suggestions by the Special Rapporteur

74. As the second report on the topic explained, a large variety of expressions has been used in international practice and in the literature to refer to the element of acceptance as law and its relationship with the other constituent element of customary international law.[210] The Special Rapporteur would recall that prior to the adoption of the text currently contained in paragraph 1 of draft conclusion 9, "[s]everal drafting suggestions were made by members of the Drafting Committee in that respect as well".[211] As the statement made in 2015 by the Chairperson of the Drafting Committee records, "[t]he Committee concluded that the phrase 'undertaken with' allowed for a better understanding of the close link between the two elements than the previous proposal 'accompanied by'".[212] This formulation was favoured, *inter alia*, for its ability to indicate "that the practice in question does not have to be motivated solely by legal considerations to be relevant for the identification of rules of customary international law".[213]

75. As regards the expression "*opinio necessitatis*", it is widely accepted that the Latin phrase "*opinio juris sive necessitatis*" refers to a single test, as is shown by the fact that it is usually shortened to "*opinio juris*" (including in the case law of the International Court of Justice[214]). This may well have "its own significance. What is

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[207] *Ibid.* (recalling also, at p. 8, the *Lotus* principle when observing that "States are not required to establish *opinio juris* or that a general and consistent practice of States supports an action as lawful before they can lawfully engage in a practice that is not otherwise legally restricted").

[208] *Ibid.*, at p. 8.

[209] See A/C.6/71/SR.24, para. 17.

[210] See also the second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672), pp. 54–55, para. 67.

[211] Statement of the Chairman of the Drafting Committee (29 July 2015), p. 7 (available at http://legal.un.org/ilc/).

[212] *Ibid.* The Special Rapporteur's original suggestion was for the term "accompanied by" (second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672), p. 56, para. 69).

[213] Statement of the Chairman of the Drafting Committee (29 July 2015), p. 7 (available at http://legal.un.org/ilc/).

[214] See *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at pp. 122–123, para. 55 and p. 135, para. 77; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 254, paras. 65 and 67 and p. 255, paras. 70, 71 and 73; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at p. 29, para. 27; *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 299, para. 111. Where the Court did employ (also) the longer phrase, it explicitly referred to a sense of legal obligation: *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 109, para. 207 (referring to the *North Sea Continental Shelf* cases). In the *Right of Passage* case the Court did not use the longer Latin phrase although it was recorded in the judgment as having been put forward by Portugal; the Court referred instead to acceptance as law (see *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at pp. 11 and 40).

generally regarded as required is the existence of an *opinio* as to the law, that the law is, or is becoming, such as to require or authorize a given action".[215] Practice motivated solely by considerations of political, economic or moral necessity can hardly contribute to customary international law, certainly so far as its identification (as opposed, possibly, to its early development) is concerned.[216] That is not to say that such considerations may not be present in addition to acceptance as law.

76. The Special Rapporteur's original proposal for a definition of the requirement of acceptance as law referred to a "sense of legal obligation";[217] it was "[f]ollowing the debate in Plenary [that] the Special Rapporteur amended his original proposal to clarify that not only a sense of legal obligation, but also a sense of a legal right, could underlie the relevant practice".[218] Indeed, as the United States has also noted, States exercising their rights under customary international law "may do so with the legal view that they are legally entitled to do so".[219] The International Court of Justice, too, has referred to practice "hav[ing] occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved";[220] and to "a practice illustrative of belief in a kind of general right for States".[221]

77. It follows that the Special Rapporteur considers that the text of conclusion 9, as adopted on first reading, should be retained. A change to the commentary may be suggested in due course to clarify that representative (and not merely broad[222]) acceptance as law, including by States whose interests are specially affected, is required (along with a general practice) to identify a rule of customary international law.

Conclusion 10: Forms of evidence of acceptance as law (*opinio juris*)

1. Comments and observations received

78. States commenting on draft conclusion 10 sought primarily to highlight the need for particular caution with regard to inaction as evidence of acceptance as law.[223] Thailand thus appreciated the use of the "more precise words 'failure to react over time to a practice'".[224] Ireland welcomed the "clear statement" in the commentary as to the specific circumstances in which inaction may have probative value as evidence of acceptance as law.[225] China agreed that by itself, "[i]naction could not be treated as implied consent; the State's knowledge of the relevant rules and its ability to react should be taken into account in determining whether a State's inaction was intentional

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[215] See the second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672), para. 65 (quoting H. Thirlway, *The Sources of International Law* (Oxford, Oxford University Press, 2014), p. 78).

[216] See also the second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672), at pp. 46–47, para. 61.

[217] *Ibid.*, at p. 56, para. 69.

[218] Statement of the Chairman of the Drafting Committee (29 July 2015), p. 7 (available at http://legal.un.org/ilc/).

[219] Written comments of the United States, p. 7.

[220] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43, para. 74.

[221] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 108, para. 206.

[222] See A/71/10, para. 63, para. (5) of the commentary to conclusion 9.

[223] See, in addition to the States referred to below, A/C.6/71/SR.21, para. 55 (Russian Federation); A/C.6/71/SR.24, para. 11 (Indonesia).

[224] See A/C.6/71/SR.22, para. 44.

[225] *Ibid.*, para. 34.

and, thus, could serve as evidence of *opinio juris*".[226] Australia stressed that "States could not be expected to react to everything, and the attribution of legal significance to inaction must depend on the circumstances of the case".[227] The Netherlands also suggested that the commentary should take account of the possibility that a State may react in a confidential manner, as well the "the role of explanations that States may at a later stage give for certain positions and their possible silence".[228] New Zealand observed that a failure to react may imply acceptance as law but only in some circumstances and cannot be presumed, also because States may choose to react on a confidential basis.[229] While agreeing with the formulation offered in paragraph 3, New Zealand suggested that the "additional elements identified" in the commentary should take their place in the text of the draft conclusion itself.[230] The Czech Republic expressed a similar concern that the current wording of draft conclusion 10, paragraph 3, might not "adequately [protect] States that did not openly object to a practice of other States from the incorrect assumption that they accepted a developing customary rule".[231] It explained that "[f]ailure to react had a different significance depending on the extent and degree to which the rights and obligations of a State were affected", and that "the failure to react must be seen in the overall context of the situation, in particular when the State not reacting to the other State's conduct consistently pursued a different practice in its own conduct vis-à-vis other States".[232] In addition, the Czech Republic suggested that the Commission should "analyse the differences between the failure to react to relevant practice in cases where a new rule of customary international law might be potentially created in areas which have not yet been regulated by any rule of customary international law on the one hand, and, on the other hand, in cases when a potential new rule would deviate from an already established customary rule".[233]

79. Other States suggested a stricter approach. The United States agreed that failure to react over time may serve as evidence of acceptance as law only when the State was in a position to react and the circumstances called for some reaction, but proposed as an additional requirement that the decision not to react "was made out of a sense

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[226] See A/C.6/71/SR.20, para. 67.

[227] See A/C.6/71/SR.21, para. 17 (adding that "inaction should not be assumed to be evidence of acceptance of law. A State would first need to know of a certain practice and have had a reasonable amount of time to respond").

[228] Written comments of the Netherlands, para. 13.

[229] Written comments of New Zealand, para. 19.

[230] *Ibid.*, at para. 20 (referring, in particular, to the requirement that the State choosing not to react be "directly affected by the practice in question, [had] known of that practice, and had sufficient time and the ability to respond").

[231] See A/C.6/71/SR.21, para. 8.

[232] *Ibid.* (explaining also that "States usually formulated open objections or protests when a practice directly or significantly affected their interests, whereas in situations in which a practice affected many or all States, the assessment of whether and how to react was more varied"). In its written comments, the Czech Republic added that the Commission should pay more attention "to the differentiation between, on the one hand, failure to react by States which are particularly (specially, directly) interested, concerned and affected by relevant practice of other States and are aware of the legal significance of their reaction or failure to react, and, on the other hand, inaction or failure to react by other states, which may be based on political, practical or other non-legal considerations and which does not stem from the sense of customary legal obligation" written comments of the Czech Republic, p. 2.

[233] Written comments of the Czech Republic, p. 2 (explaining that "[t]he fact that [a] certain customary rule already exists serves as a stabilizing factor and, in general, reduces the need to react to practice of other States which deviates from such a rule (the principle being that a deviation from [an] already established rule is regarded as the breach of that rule and not as the beginning of creation of a new rule)").

of legal obligation".[234] Israel, too, submitted that "evidence that the failure to react itself stemmed from a sense of customary legal obligation" was required, suggesting also that the commentary address the practical difficulty of ascertaining evidence of acceptance as law from mere inaction.[235]

80. As for other forms of evidence of acceptance as law, India agreed that government legal opinions may be valuable as evidence of acceptance as law, but said that "it might be difficult to identify such opinions, as many countries did not publish the legal opinions of their law officers".[236] The Netherlands considered that the reference to decisions of national courts in draft conclusion 10 should be qualified because these "can only form evidence of *opinio juris* when such decisions are not rejected by the State's executive".[237] Belarus considered that "[a]ny conduct by a State that indicates that the State is applying a rule of customary international law despite having to forego some advantages and benefits is one form of evidence of acceptance of the rule as law".[238] The United States, however, noted that caution must be exercised in assessing any evidence of the *opinio juris* of a State "to determine whether it in fact reflects a State's views on the current state of customary international law".[239]

81. Viet Nam pointed to the "divergence between the forms of State practice set out in draft conclusion 6 and the forms of evidence of *opinio juris* set out in draft conclusion 10", and suggested that clarification should be provided in this respect.[240] The Republic of Korea similarly suggested that while "[i]t is only natural that the forms of state practice listed in paragraph 2 of conclusion 6 and the evidence of acceptance as law listed in paragraph 2 of conclusion 10 overlap to a considerable degree", it may be useful "to seek consistency in the use of terms as well as the order in which they are listed in both conclusions" in order to prevent confusion.[241] It also considered that "[a]n explanation may also be needed to clarify discrepancies, where they exist".[242] The Netherlands suggested that a reference to the *opinio juris* of international organizations should be included in the commentary,[243] and, like Austria, considered that it would be useful to clarify how to identify or establish *opinio juris* of international organizations.[244]

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[234] Written comments of the United States, pp. 10–11 (suggesting changes to the text of the conclusion and commentary to that effect).

[235] Written comments of Israel, paras. 14–15.

[236] See A/C.6/SR.24, para. 18.

[237] Written comments of the Netherlands, para. 12 (adding that "[s]uch rejection can be said to exist when the executive considers and externally presents such decisions as not representing the State's position on the issue. This qualification follows from the proposition that *opinio juris* requires consistency of the different branches of government").

[238] Written comments of Belarus, p. 3.

[239] Written comments of the United States, p. 15.

[240] See A/C.6/71/SR.22, para. 50.

[241] Written comments of the Republic of Korea, para. 3.

[242] *Ibid.*

[243] Written comments of the Netherlands, para. 14 (adding that the possibility of *opinio juris* of international organizations "follows from the international legal personality of such organizations").

[244] Written comments of Austria, p. 2; written comments of the Netherlands, para. 7.

2 *Suggestions by the Special Rapporteur*

82. The Special Rapporteur agrees that acceptance as law must not lightly be inferred from inaction.[245] This is reflected in the drafting of conclusion 10, paragraph 3,[246] and is further explained in the commentary. The Special Rapporteur accepts, however, that the commentary could further emphasize the particular caution that is required and recognize explicitly that States, if pressed, may give other explanations for their silence. This may also reassure those who suggested an additional requirement, namely, that the inaction should also be shown to be motivated by acceptance as law, which may be thought to be somewhat circular.

83. The Special Rapporteur agrees with the suggestion that the commentary to conclusion 10 should include a general statement to the effect that evidence of acceptance as law must be carefully assessed in order to determine whether it reflects the State's legal view as to its rights or obligations under customary international law. Such an assessment may doubtless take into account any difference of opinion that may be shown to exist among the different organs of the State, consistent with the guidance offered by conclusion 7. The commentary may also clarify that conclusion 10 applies, *mutatis mutandis*, to international organizations, as they may give rise to the forms of evidence listed.[247]

84. The Special Rapporteur considers that there is good reason for the differences between the list of forms of practice contained in draft conclusion 6 and the list of forms of evidence of acceptance as law in draft conclusion 10: each list is intended to refer to the principal examples connected with each constituent element. If the Commission agrees with this assessment, it may wish to consider explaining it in the commentary.

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[245] See also the position recently expressed by Judge de Brichambaut of the International Criminal Court in his minority opinion in the case concerning *Prosecutor v. Omar Hassan Ahmad Al-Bashir*: "While silence or inaction may amount to acquiescence with the existing rule of customary international law regarding immunities in certain circumstances, such silence may also simply reflect the sensitive nature of immunity and the unwillingness of State officials to commit themselves to a definite position on the matter" (No. ICC-02/05-01/09, Decision under article 87 (7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir (6 July 2017), para. 91); and see F. Vismara, "Rilievi in tema di inaction e consuetudine internazionale alla luce dei recenti lavori della Commissione del diritto internazionale", *Rivista di diritto internazionale*, vol. 99, No. 4 (2016), pp. 1026–1041.

[246] See also the statement of the Chairman of the Drafting Committee (29 July 2015), p. 10, available at http://legal.un.org/ilc/ ("The Drafting Committee shared the view that States could not be expected to react to each instance of practice by other States. Attention is drawn to the circumstances surrounding the failure to react in order to establish that these circumstances indicate that the State choosing not to act considers such practice to be consistent with customary international law").

[247] See also para. 45 above, and footnote 119 above; Odermatt, "The development of customary international law by international organizations" (footnote 112 above), at p. 493.

Part Five: Significance of certain materials for the identification of customary international law

Conclusion 11: Treaties

1. Comments and observations received

85. Draft conclusion 11 was widely endorsed by States, which considered it to be "helpful and [to] accurately capture the role that treaties ... play in this context".[248] Singapore, however, considered that the "distinction in treatment between the ways in which a treaty rule can reflect customary international law is not apparent from the text of draft conclusion 11, paragraph 1" and proposed that the text be revised "so that this distinction is clearly reflected in the text of the draft conclusion itself".[249]

86. The Russian Federation suggested that it would be preferable to clarify that reference was being made to multilateral agreements, and to bring into the draft conclusion, from the commentary, the sentence that clarifies that "in and of themselves, treaties could not create customary international law".[250] Belarus similarly highlighted the relevance of "universal multilateral international treaties" and their possible "'spilling over' into international custom", proposing that this possibility should be studied further.[251] The United States suggested some changes to the commentary, including that the reference to widely ratified treaties as particularly indicative be deleted because this is "likely to be misunderstood to suggest that widely ratified treaties most likely reflect customary international law norms, when that is not the case".[252] Israel expressed a similar concern, also with regard to any reference to the possible value of treaties that are not yet in force or which have not yet attained widespread participation.[253]

87. New Zealand appreciated the caution mandated by paragraph 2 of the draft conclusion with regard to reliance on bilateral treaties for purposes of identifying customary international law.[254] India considered that "only treaty provisions that created fundamental norms could generate [rules of customary international law]", and that "[s]trong opposition to a particular treaty, even if only from a few countries, could be a factor that should be taken into account when identifying customary international law".[255] Singapore submitted that a rule of customary international law "should not be assumed to be reflected in a treaty rule only because another similarly worded treaty rule in a separate other treaty has been found to be reflective of customary international law".[256]

[248] Written comments of New Zealand, para. 22 (referring specifically to the three categories identified in paragraph 1); see also, for example, A/C.6/71/SR.21, para. 56 (Russian Federation) and para. 101 (Chile); A/C.6/71/SR.22, para. 62 (Japan); A/C.6/71/SR.24, para. 10 (Indonesia); A/C.6/71/SR.29, para. 66 (Turkey); written comments of the United States, p. 16; written comments of Israel, para. 38.

[249] Written comments of Singapore, para. 16.

[250] See A/C.6/71/SR.21, para. 56; see also para. 109 (Spain).

[251] Written comments of Belarus, p. 3.

[252] Written comments of the United States, p. 16.

[253] Written comments of Israel, para. 38.

[254] Written comments of New Zealand, para. 23.

[255] See A/C.6/71/SR.24, para. 18.

[256] Written comments of Singapore, para. 17.

2 Suggestions by the Special Rapporteur

88. The Special Rapporteur considers that no change is required in the text of draft conclusion 11, including in paragraph 1 that sets out the recognized circumstances in which a rule set forth in a treaty may be found to reflect customary international law. As with the other conclusions, the explanations in the commentary should not be overlooked.

89. The commentary highlights the particular relevance of multilateral treaties by referring to "treaties that have obtained near-universal acceptance" or those adopted "by an overwhelming majority of States".[257] Depending always on the particular circumstances, this is hard to deny, at least in respect of certain rules set forth therein. The United Nations Convention on the Law of the Sea, the Vienna Convention on the Law of Treaties, the four Geneva Conventions of 1949, and the Vienna Convention on Diplomatic Relations, are but a few examples. Pointing to the extent of participation in a treaty as a possible important factor is not intended to detract in any way from the strict requirements stipulated in the conclusion for establishing that a rule set forth in such treaties (or others) reflects a rule of customary international law. The Special Rapporteur suggests that the Commission review the commentary with this in mind. The clarification that treaties are anyway binding only on the parties thereto fits well in the commentary in this regard.[258] It may also be useful to refer explicitly in the commentary to the relevance of the attitude of States towards a treaty, both at the time of its conclusion and subsequently.

Conclusion 12: Resolutions of international organizations and intergovernmental conferences

1 Comments and observations received

90. Draft conclusion 12 met with widespread approval from States which commented on it.[259] Argentina, observing that draft conclusion 12 "reflected generally-accepted doctrine", nevertheless considered that it "would benefit from greater precision ... [i]n particular, the wording should clarify whether soft law could crystallize pre-existing rules of customary international law".[260] Chile similarly suggested that it ought to be explained why draft conclusion 12 did not mention "the generating or crystallizing effects referred to in draft conclusion 11".[261] Spain also referred to the differences between draft conclusions 12 and 11, and suggested that resolutions were no less important than treaties in the present context and that the wording used in draft conclusion 11 could well be employed in conclusion 12, being "sufficiently flexible to adapt to the circumstances of each resolution and each organization".[262] Spain considered, more generally, that the "lack of parallels between draft conclusions 11 and 12 might be a problem".[263] Poland considered draft conclusion 12 to be "too restrictive with regard to the role of international organizations in creating

[257] A/71/10, para. 63, para. (3) of the commentary to conclusion 11.

[258] *Ibid.*, para. (2).

[259] See, in addition to States referred to below, A/C.6/71/SR.20, para. 52 (Nordic countries) and joint Nordic written comments, p. 1; A/C.6/71/SR.21, para. 9 (Czech Republic) and para. 18 (Australia); A/C.6/71/SR.22, para. 62 (Japan); A/C.6/71/SR.24, para. 10 (Indonesia) and para. 18 (India); A/C.6/71/SR.29, para. 66 (Turkey); written comments of Singapore, para. 18; written comments of the United States, p. 17; written comments of Belarus, p. 3.

[260] See A/C.6/71/SR.22, para. 75.

[261] See A/C.6/71/SR.21, para. 101.

[262] *Ibid.*, at para. 108.

[263] *Ibid.*, at para. 109.

customary rules", and suggested, moreover, that the conclusion should distinguish between "custom that was binding only within an international organization and custom as part of general customary rules".[264] The Russian Federation endorsed the approach taken in draft conclusion 12, but doubted whether a resolution adopted by an international organization "could be regarded as an act of that organization, which was a rather broad term that could include not only decisions of bodies composed of States".[265] New Zealand, on the other hand, considered that a clearer explanation of why resolutions are not considered as "practice" of the relevant organization would be useful within a broader examination of the relationship between conclusion 12 and conclusion 4, paragraph 2.[266]

91. Singapore proposed the addition of the words "in certain circumstances" to paragraph 2 of the conclusion, to mirror the language of the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion and clarify further that "not *all* ... resolutions can provide evidence of or contribute to the development of customary international law".[267] The United States, observing that the draft conclusion and commentary accurately reflected that "resolutions must be approached with a great deal of caution", made the same suggestion.[268] Singapore further suggested that in assessing whether the States concerned intended to acknowledge the existence of a rule of customary international law by the adoption of a resolution, "a consideration of the particular powers, membership and functions of the [international organization] or intergovernmental conference" would be relevant, and these factors should thus be incorporated into the commentary to the conclusion.[269] Belarus considered that the commentary should also refer to "situations when there was a lack of clear support by States for such resolutions".[270] Sudan observed that "[w]hen assessing the decisions of international organizations, it was important to focus on the organ within the organization that had the broadest membership. Only intergovernmental organizations should be considered, and the context and means of adoption of the decision should be taken into account".[271] The Islamic Republic of Iran suggested that the evidentiary basis of resolutions of international organizations "remained open to question, since such resolutions were sometimes adopted by political organs and did not reflect *opinio juris*".[272] Viet Nam considered that it may be useful to refer to the necessary caution in other conclusions that refer to resolutions.[273]

92. Several States suggested that the particular relevance of General Assembly resolutions should be highlighted. Algeria considered that "the resolutions of the General Assembly, a plenary organ of near universal participation which provided a legitimate and authoritative source of international law, should not only be given special attention, as indicated in the commentary to draft conclusion 12, but should

[264] See A/C.6/71/SR.22, para. 31.
[265] See A/C.6/71/SR.21, para. 57 (referring to conclusions 6 and 10).
[266] Written comments of New Zealand, para. 25.
[267] Written comments of Singapore, para. 19.
[268] Written comments of the United States, p. 17.
[269] Written comments of Singapore, para. 20.
[270] See A/C.6/71/SR.23, para. 4; see also written comments of Belarus, p. 4 (explaining that "[e]ven resolutions that are adopted by consensus may be evidence not of the existence of *opinio juris* but rather of the lack of interest among the majority of States in the issues being addressed by the resolution or of the very general nature of its provisions, which therefore make them, ipso facto, of little legal consequence").
[271] See A/C.6/71/SR.21, para. 141.
[272] See A/C.6/71/SR.23, para. 15.
[273] See A/C.6/71/SR.22, para. 50.

be treated as a distinct category in the context of resolutions of international organizations and intergovernmental conferences".[274] The Russian Federation, considering that the draft conclusion "should reflect the fact that the authority of the act of the organization depended on its universality and its status in international relations", similarly suggested that its text could perhaps include a direct reference to the United Nations.[275] Egypt, too, sought to emphasize the "special importance of the resolutions of the General Assembly, which had worldwide membership".[276] The Nordic counties felt that "the unique characteristics of the [United Nations] General Assembly and what sets it apart from other international organizations" as well as "the importance of [its] resolutions' content and conditions of their adoption" could be further developed in the commentary.[277]

2. *Suggestions by the Special Rapporteur*

93. The lack of parallelism between draft conclusions 11 and 12 in terms of structure and language was a deliberate choice by the Commission on first reading. The Commission considered it important to emphasize at the outset that resolutions cannot create rules of customary international law, both to address such misconceptions as have sometimes been aired and more clearly to introduce, in paragraph 2, their actual significance.[278] In paragraph 2, the possible generating or crystallizing effects of resolutions in connection with customary international law are covered by the term "development". The commentary indeed makes clear that, "as with treaty provisions", resolutions may provide impetus for the growth of, or crystallize, customary international law.[279] It further provides, more broadly, that "[m]uch of what has been said of treaties in draft conclusion 11 applies to resolutions".[280] The conclusion's focus on the possible utility of resolutions as evidence for the identification of customary international law also means that it does not deal (at least not directly) with the direct role of international organizations in the creation or expression of such rules.[281] In that sense it is consistent with draft conclusion 4, or, perhaps more accurately, not inconsistent with it.

94. The commentary already refers to the "[s]pecial attention [that] is paid in the present context to resolutions of the General Assembly, a plenary organ of near universal participation that may afford a convenient means to examine the collective opinions of its members".[282] Nevertheless, the Special Rapporteur accepts that it

[274] See A/C.6/71/SR.23, para. 30.

[275] See A/C.6/71/SR.21, para. 57.

[276] See A/C.6/71/SR.23, para. 41.

[277] See A/C.6/71/SR.20, para. 52; joint Nordic written comments, p. 1 (noting also that "[a]s was also stated by Special Rapporteur [...] in his third report, General Assembly resolutions may be particularly relevant as evidence of or impetus for customary international law. However, as the report also notes, caution is required when determining the normative value of such resolutions since 'the General Assembly is a political organ in which it is often far from clear that their acts carry juridical significance'").

[278] See also the statement of the Chairman of the Drafting Committee (29 July 2015), p. 13 ("This statement was originally made, in a slightly different form, in the second sentence of the proposal made by the Special Rapporteur in his third report. In view of its importance for the present topic, the Drafting Committee considered that it should be the object of a specific paragraph and be placed at the beginning of the draft conclusion").

[279] See A/71/10, para. 63, para. (7) of the commentary to conclusion 12.

[280] *Ibid.*, para. (3).

[281] This is further made clear by the inclusion of conclusion 12 in part five of the conclusions, entitled "Significance of certain materials for the identification of customary international law".

[282] See A/71/10, para. 63, para. (2) of the commentary to conclusion 12.

could further highlight the potential importance of General Assembly resolutions. The commentary could also distinguish more clearly between resolutions of international organizations and those of ad hoc international conferences.[283] It could also specify that the conclusions are not dealing directly with the internal law of international organizations.

95. The Special Rapporteur also agrees that conclusion 12 would better reflect the potential role of resolutions if some qualifying words were reintroduced, for example, "in certain circumstances".[284] Such circumstances, to which several States referred, are already mentioned in the commentary. It would also be preferable to replace the word "establishing" by "determining", for greater consistency within the conclusions as a whole.[285] Conclusion 12, paragraph 2, would thus read as follows:

> *A resolution adopted by an international organization or at an intergovernmental conference may, in certain circumstances, provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development*

Conclusion 13: Decisions of courts and tribunals

1 Comments and observations received

96. While general support was expressed for draft conclusion 13,[286] the distinction made between decisions of national and international courts drew several comments. Austria expressed doubt that such a distinction should be made, explaining that "Article 38 of the Statute of the International Court of Justice did not do so, and a distinction would also fail to give sufficient attention to important decisions of national courts which, as draft conclusion 6 confirmed, were a form of State practice of relevance for the formation of customary international law".[287] It added that "[p]ossible differences between decisions, whether of international courts and tribunals or of national courts, [as subsidiary means for the determination of a rule of law] resulted only from their different persuasive force".[288] Austria also suggested that maintaining a strict distinction between international and national courts was difficult in practice, pointing to "regional courts, such as the European Court of Human Rights and the Court of Justice of the European Union, which exercised functions both as international courts and, at the same time, as quasi-national or even constitutional courts".[289]

97. Viet Nam, on the other hand, considered that it was difficult to maintain that decisions of national courts had the same value as those of international courts, and that the latter (in particular those of the International Court of Justice) should weigh more than the former.[290] China considered that decisions of national courts "simply

[283] See also written comments of the United States, p. 19; Blokker, "International organizations and customary international law" (footnote 22 above), at p. 9.

[284] See also the third report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/682), para. 54 (the Special Rapporteur's suggested text for the conclusion including the words "in some circumstances").

[285] The verb "determine" is used in a comparable context in conclusions 1, 2, 13, 14 and 16.

[286] See, for example, A/C.6/71/SR.21, para. 9 (Czech Republic); written comments of Singapore, para. 21; written comments of Belarus, p. 3.

[287] See A/C.6/71/SR.21, para. 72.

[288] *Ibid.*, para. 73.

[289] *Ibid.*, para. 74.

[290] See A/C.6/71/SR.22, para. 51 (explaining that "[n]ational courts varied in their country-specific constraints and the doctrine of precedent in domestic law").

reflected the legal system of the State in question and therefore had limited relevance to international law".[291] New Zealand suggested that "the judgments of international courts and tribunals should be accorded greater weight" as subsidiary means, and proposed that "this could be reflected more directly in the language of draft conclusion 13 itself".[292] Sudan observed that "the decisions of the International Court of Justice were of pivotal importance and could not be seen as having the same weight as the decisions of other international courts",[293] a view that the Russian Federation appears to share.[294] Mexico suggested that it would be useful to clarify "whether the evidentiary value of the decisions of international courts [as subsidiary means for the determination of rules of customary international law] should carry greater weight than those of national courts".[295] Indonesia emphasized that the real significance of judicial decisions depended on the way they were received.[296]

98. The Russian Federation considered that the commentary to conclusion 13 should make it clear that the decisions of international courts and tribunals were binding only on the States parties to the case, and that they could not serve as conclusive evidence for the identification of customary international law.[297] It further suggested that the conclusion itself should contain the proposition, already made in similar terms in the commentary, that "the weight of the court's decision depended on the reception of the decision by States and on the status of the court in the system of international relations".[298] The United States recommended that the limitations on the value of judicial decisions as subsidiary means be further clarified in the commentary (and made several suggestions to this effect), explaining that this "could usefully assist readers to assess more critically" the pronouncements by courts and tribunals on customary international law.[299] Spain suggested that the word "subsidiary" be deleted from both paragraphs of the conclusion, explaining that the fact that judicial decisions (and teachings) "were not independent sources of international law, but were subsidiary to independent sources, did not mean that, in relation to [the] determination of law, they played a secondary role to treaties and resolutions of international organizations".[300]

2. *Suggestions by the Special Rapporteur*

99. The Special Rapporteur considers that the present wording of draft conclusion 13 represents a satisfactory balance and should be maintained. In particular, it seems difficult to deny that greater caution is called for when seeking to rely on decisions of national courts, which may reflect a particular national perspective and may not have international law expertise available to them. This is captured in the text of the conclusion, both in the distinction made between the two types of decisions and by the different wording used for each (in particular the explicit reference to the International Court of Justice in paragraph 1, and the use of the words "[r]egard may be had, as appropriate" in paragraph 2). As the Chairperson of the Drafting Committee said in 2015, "during the debate in the Plenary, several members cautioned against

[291] See A/C.6/71/SR.20, para. 68.
[292] Written comments of New Zealand, para. 26.
[293] See A/C.6/71/SR.21, para. 140.
[294] *Ibid.*, at para. 58 (saying that "a decision of the International Court of Justice could hardly be placed on a par with the decisions of an ad hoc tribunal or a court of arbitration established under a bilateral agreement").
[295] See A/C.6/71/SR.22, para. 25.
[296] See A/C.6/71/SR.24, para. 11.
[297] See A/C.6/71/SR.21, para. 58.
[298] *Ibid.*
[299] Written comments of the United States, p. 18.
[300] See A/C.6/71/SR.21, para. 110.

elevating decisions of national courts, in terms of their value for identifying rules of customary international law, to the same level of those of international courts and tribunals, which in practice play a greater role in this context. Accordingly, the Drafting Committee decided to deal with decisions of international and national courts in two separate paragraphs".[301] At the same time, the commentary makes clear that the value of *all* decisions may vary, "depending both on the quality of the reasoning ... and on the reception of the decision by States and by other courts".[302] The commentary also explains that "[t]he distinction between international and national courts is not always clear-cut", and provides some guidance on this matter.[303]

100. It will also be recalled that in employing the term "subsidiary means" to refer to decisions of courts and tribunals, "[t]he intention [was] not to downplay the practical importance of such decisions as the word 'subsidiary' might be thought to imply, but rather to situate them in relation to the sources of law as referred to in Article 38 (1) (a), (b) and (c) of the Statute [of the International Court of Justice]. The term 'subsidiary' is thus to be understood in opposition to the primary sources".[304] The commentary clarifies this,[305] and the Commission may wish to review it to confirm that it adequately does so. Other small changes to the commentary may be considered in view of the suggestions noted above, including the addition of a statement clarifying that decisions of international courts and tribunals are binding on the parties alone.

Conclusion 14: Teachings

1. Comments and observations received

101. Support was expressed by several States for draft conclusion 14 as adopted on first reading.[306] At the same time, Spain suggested that the word "subsidiary" be deleted from the text, to better reflect the role of teachings in the determination of rules of customary international law.[307] China, on the other hand, made the point that "[w]hile the views of public law scholars had historically served as an important basis for international law", that is no longer the case.[308] Israel considered that the commentary to the conclusion should clarify that the writings consulted should be "exhaustive, empirical and objective in nature".[309] The United States suggested that the commentary should "recommend that those using these subsidiary means seek out conflicting or divergent views to allow for the most accurate assessment of the law", so that the pronouncements of publicists on customary international law would be assessed more critically.[310]

102. Belarus suggested that the commentary "should state that the work of the Commission was among the most important subsidiary means for the determination

[301] Statement of the Chairman of the Drafting Committee (29 July 2015), p. 15 (available at http://legal.un.org/ilc/).

[302] See A/71/10, para. 63, para. (3) of the commentary to conclusion 13, which mentions other possible considerations as well.

[303] *Ibid.*, para. (6).

[304] Statement of the Chairman of the Drafting Committee (29 July 2015), pp. 15–16 (available at http://legal.un.org/ilc/).

[305] See A/71/10, para. 63, para. (2) of the commentary to conclusion 13.

[306] See, for example, A/C.6/71/SR.21, para. 9 (Czech Republic) and para. 101 (Chile); written comments of Belarus, p. 3.

[307] See A/C.6/71/SR.21, para. 110.

[308] See A/C.6/71/SR.20, para. 68.

[309] Written comments of Israel, para. 32.

[310] Written comments of the United States, p. 18.

of rules of customary international law".[311] Chile, on the other hand, suggested that conclusion 12 might be a place to mention the work of the Commission, "since, generally speaking, once the Commission had completed its work on a draft, the General Assembly took steps to adopt it as an annex to a resolution".[312]

2. *Suggestions by the Special Rapporteur*

103. The Special Rapporteur considers it important to retain the reference to teachings as "a subsidiary means", thereby following the widely accepted language of the Statute of the International Court of Justice (as the Commission deliberately elected to do).[313] The expression encapsulates the limited role of such materials in the identification of customary international law. At the same time, a change to the commentary could be considered to explain more clearly that the term "subsidiary means" is not intended to suggest that teachings are not important in practice (as is already done with regard to decisions of courts and tribunals in the commentary to draft conclusion 13).[314]

104. The commentary already makes clear that particular caution is required when drawing upon writings, including because they "may reflect the national or other individual positions of their authors" and "differ greatly in quality".[315] The importance of "having regard, so far as possible, to writings representative of the principal legal systems and regions of the world and in various languages" is also highlighted.[316] The Special Rapporteur does not consider that further guidance on the need to assess the authority of any given work is necessary, also bearing in mind the language ("may") of the conclusion.

105. The Special Rapporteur recalls that an extensive debate has already taken place within the Commission on the most appropriate way to reflect the particular significance that the Commission's output plays in the identification of customary international law.[317] The Special Rapporteur's original suggestion had been to cover the Commission's output under "Teachings",[318] but it was felt preferable to acknowledge that the Commission's output is different in important respects from the teachings of scholars, and to explain this separately from draft conclusion 14. The Special Rapporteur considers that the most appropriate place to do so is in the general commentary introducing Part Five of the conclusions, and notes the general support by States for this approach. That being said, the Commission may find it helpful for the commentary to conclusion 14 to include a cross reference to what is said in the general commentary.

[311] See A/C.6/71/SR.23, para. 3; see also written comments of Belarus, p. 4.

[312] See A/C.6/71/SR.21, para. 101 (adding that "[i]n any case, one of the draft conclusions should contain a specific reference to the Commission").

[313] See also the statement of the Chairman of the Drafting Committee (29 July 2015), p. 17 (available at http://legal.un.org/ilc/).

[314] See A/71/10, para. 63, para. (2) of the commentary to conclusion 13.

[315] *Ibid.*, para. (3) of the commentary to conclusion 14.

[316] *Ibid.*, para. (4).

[317] See also A/CN.4/SR.3303, provisional summary record of the Commission's 3303rd meeting (24 May 2016), p. 9.

[318] A/CN.4/682, third report on identification of customary international law (2015), p. 45, para. 65.

Part Six: Persistent objector

Conclusion 15: Persistent objector

1. Comments and observations received

106. The inclusion of the persistent objector rule in the draft conclusions was endorsed by almost all States which addressed the matter.[319] Singapore "affirm[ed] the existence of the 'persistent objector' principle as stated in draft conclusion 15, paragraph 1, and considers its existence to be *lex lata*".[320] Indonesia "shared the view that both judicial decisions and State practice had confirmed" the existence of the rule,[321] and Turkey noted its appreciation "for the many practical examples cited in the commentary".[322] On the other hand, Cyprus and the Republic of Korea, while not necessarily opposing the inclusion of the rule, maintained that it remained controversial.[323]

107. Several States indicated that the risk of the persistent objector rule being abused should be more explicitly addressed. Some expressed the opinion that the rule could not apply in the case of rules having the character of *jus cogens*, and proposed that the conclusion or commentary should say so.[324] Other States welcomed the "without prejudice" paragraph in the draft commentary.[325] Greece doubted that the rule could be applicable "in relation not only to the rules of *jus cogens* but also to the broader category of the general principles of international law", and suggested that the commentary should address the matter.[326] A similar thought was expressed by the Nordic countries, who commented that "[p]articular attention must in this context be paid to the category of a rule to which a State objects, and consideration must be given to universal respect for fundamental rules, particularly those for the protection of individuals".[327] Belarus, supporting the persistent objector rule, also considered that it should not apply to the detriment of the international community or "the integrity of the international legal system as a whole".[328] A view was also expressed

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[319] See, for example, A/C.6/71/SR.20, para. 52 (Nordic countries) and joint Nordic written comments, p. 2; A/C.6/71/SR.21, para. 9 (Czech Republic), para. 28 (El Salvador), para. 59 (Russian Federation), para. 75 (Austria), para. 102 (Chile); written comments of New Zealand, para. 27; written comments of Belarus, p. 4.

[320] Written comments of Singapore, para. 23.

[321] See A/C.6/71/SR.24, para. 11 (adding that "[t]he role of the persistent objector was indeed important for preserving the consensual nature of customary international law").

[322] See A/C.6/71/SR.21, para. 23.

[323] See A/C.6/71/SR.22, paras. 53–54 (Cyprus considering it "premature to develop a draft conclusion on the question" for the reason that "[i]nternational jurisprudence had largely dealt with the matter in obiter dicta and in cases where the rule had not, at the time in question, acquired the status of customary international law", adding that "the issue required further elaboration, as [the differing views] had implications for the authority of the rule", but also expressing support for some of the clarifications provided in the conclusion); A/C.6/71/SR.23, para. 12 (Republic of Korea) and written comments of the Republic of Korea, para. 5 (considering that "this doctrine has substantial implications for the norm-creating process in international law, therefore requiring further review with great caution").

[324] See A/C.6/71/SR.21, paras. 28–29 (El Salvador) and written comments of El Salvador, p. 3; A/C.6/71/SR.21, para. 102 (Chile) and para. 111 (Spain); written comments of New Zealand, para. 28.

[325] See A/C.6/71/SR.22, para. 18 (Brazil); joint Nordic written comments, p. 2; written comments of Singapore, para. 25; written comments of Belarus, p. 2.

[326] See A/C.6/71/SR.22, para. 10; see also *ibid.*, para. 54 (Cyprus).

[327] Joint Nordic written comments, p. 2; see also A/C.6/71/SR.20, para. 52 (Nordic countries).

[328] Written comments of Belarus, p. 4.

that the persistent objector rule must not be available for purposes of avoiding treaty obligations.[329] El Salvador proposed that the conclusion should "make it clear that States could not avail themselves of that rule when an established rule of customary law already existed".[330]

108. The question of the extent to which an objection to a rule needed to be reiterated received particular attention. China, considering that the commentary was generally "consistent with international practice" in clarifying that States are not expected to react on every occasion, nevertheless expressed the view that "if the country concerned has previously expressed its unequivocal opposition at an appropriate time, it need not do so again".[331] Israel suggested that it should be clarified that "an objection clearly expressed by a sovereign State during the process of the formation of a customary rule is sufficient to establish that objection, and does not generally need to be repeated to remain in effect".[332] The Netherlands, too, submitted that "[t]here cannot be an obligation to repeat the desire not to be bound, if the State has made its wish not to be bound sufficiently clear during the formative period of the rule", adding that it cannot "theoretically or logically" be otherwise.[333] The Nordic countries, on the other hand, agreed with the text of the draft conclusion that objection must be maintained,[334] and Chile likewise asserted that "[t]he objector was responsible for ensuring that its objection was not considered to have been abandoned".[335] The United States also accepted the draft commentary's reference to the pragmatic assessment required in determining whether an objection has been maintained persistently (but suggested that the example provided, of "a conference attended by the objecting State at which the rule is reaffirmed", may be misleading and would be better deleted).[336] The Russian Federation, while endorsing draft

[329] See A/C.6/71/SR.20, para. 69 (China); see also A/C.6/71/SR.21, para. 28 (El Salvador).

[330] See A/C.6/71/SR.21, para. 28.

[331] Written comments of China, p. 3 (submitting also that "the determination that a country is a 'persistent objector' should be context-specific, and comprehensive consideration should be given to various factors, including whether in a given case the country concerned is in a position to express its opposition"). In the Sixth Committee debate, China said that "the failure of a State to object to an emerging rule of customary international law could not be considered to constitute acceptance of the rule, unless it had been determined that the State had been aware of the rule and that it had been under an obligation to object explicitly and persistently in order not to accept it" (A/C.6/71/SR.20, para. 69).

[332] Written comments of Israel, para. 17 (also recommending, at para. 18, that the conclusion and commentary "include clear criteria for the retraction of an objection, whereby it must be clearly expressed as a change in the State's *opinio juris* and made known to other States and not merely inferred").

[333] Written comments of the Netherlands, para. 15 (explaining that "once the position of persistent objector has been acquired through the required steps, and the customary rule has been established — this position does not require any further maintenance in the form of continuing objections … the rule is in fact the opposite: only when there is subsequent practice, or expressions of legal opinion by the persistent objector in support of the 'new' rule, and in deviation from its original position as persistent objector, will it lose that position").

[334] Joint Nordic written comments, p. 2.

[335] See A/C.6/71/SR.21, para. 102.

[336] Written comments of the United States, pp. 18–19 (explaining that "it would rarely, if ever, be necessary for a State to object at a particular conference to maintain its status as a persistent objector to a rule of customary international law accepted by other States. For example, a State might decline to make a statement at a diplomatic conference for a variety of political or practical reasons that do not evince a legal view, and it seems strange that a statement after the conference would not have the same effect under customary international law as a statement at the conference. More generally, the example could misleadingly suggest that there is a particular significance to international conferences as forums for practice relevant to the formation of customary international law, which we do not believe to be the case").

conclusion 15, added that the need for the objection to the maintained persistently was not free from difficulty, as "[i]t was important to take into consideration the functioning of government bodies not only in well-organized developed States, but also in States with small ministries of foreign affairs and without the resources to maintain their objection persistently, even in situations in which their interests were directly concerned".[337] Belarus suggested that paragraph 2 "should be reworded, along the lines of draft conclusion 10, paragraph 3, to refer to situations when States were in a position to react and to the circumstances calling for such a reaction".[338] Cyprus asked to clarify whether an objection "could be maintained in the long run, or, in particular, after an emerging rule had come to be part of the corpus of international law",[339] and Greece, too, said it would welcome such a clarification.[340]

2 Suggestions by the Special Rapporteur

109. Draft conclusion 15 and its commentary were adopted while especially bearing in mind the need to prevent abusive reliance on the persistent objector rule.[341] Paragraph 1, by requiring an objection while a rule of customary international law "was in the process of formation", clearly conveys that timeliness is critical and that, once a rule has come into being, a subsequent objection will not avail a State wishing to exempt itself.[342] Paragraph 2 stipulates additional "stringent requirements".[343] It is also clear that an obligation undertaken by treaty cannot be excluded by recourse to the persistent objector rule. As for the inapplicability of the rule in relation to *jus cogens*, the Special Rapporteur would recall that the Commission had accepted early on that *jus cogens* would not be covered under the present topic. It is now considering a separate topic on "Peremptory norms of general international law (*jus cogens*)".[344] The Commission may, nevertheless, wish to consider including in the conclusion the point already in paragraph (10) of the commentary, by adding a paragraph 3 on the following lines:

> *The present conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).*

110. While the suggestion that a single objection clearly expressed should be sufficient to secure persistent objector status has its appeal from a strict voluntarist perspective of international law, it runs counter not only to the common understanding

[337] See A/C.6/71/SR.21, para. 59.

[338] See A/C.6/71/SR.23, para. 4; see also written comments of Belarus, pp. 4–5.

[339] See A/C.6/71/SR.22, para. 54.

[340] Ibid., para. 11.

[341] See also the fourth report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/695), para. 27.

[342] This is further made clear by the commentary: A/71/10, para. 63, para. (5) of the commentary to conclusion 15.

[343] *Ibid.*, para. (2). See also A/C.6/71/22, para. 54 (Cyprus saying that "as the draft conclusions made clear, a State invoking the persistent objector rule should be under a duty to present solid evidence of its longstanding and consistent opposition to the rule in question in any given case before its crystallization").

[344] See the statement of the Chairman of the Drafting Committee (29 July 2015), p. 20, available at http://legal.un.org/ilc/ ("The Drafting Committee also had a brief discussion on whether there should be an additional paragraph to reflect the impossibility of having a persistent objector status with respect to a rule of *jus cogens*. This was a matter that was also raised in Plenary. It would be recalled that the Commission decided not to deal with *jus cogens* in the context of the present topic; indeed, the separate topic '*Jus cogens*' is now on the Commission's programme of work. It was therefore considered that the matter would be best dealt with in the framework of that other topic").

of the persistent objector rule (as well as its very name) but also to the way in which custom may operate as a source of international law. In particular, such a view "seems to disregard the legal force that may sometimes attach to silence (when it amounts to acquiescence), and to downplay the importance of inaction in both the development and the identification of rules of customary international law".[345] That *persistent* objection is required has indeed been recognized in international practice,[346] by doctrine,[347] and by the Commission itself, in its 2011 Guide to Practice on Reservations to Treaties.[348] As the commentary specifies, persistent objection means that the customary rule in question is inapplicable against the relevant State so long as it maintains the objection.[349]

111. At the same time, as some States have noted with appreciation,[350] the commentary adopted on first reading makes clear that assessing the persistency requirement "needs to be done in a pragmatic manner, bearing in mind the

[345] See the fourth report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/695), para. 28.

[346] See, for example, *Entscheidungen des Bundesverfassungsgerichts* (German Federal Constitutional Court), vol. 46, Beschluss vom 13. Dezember 1977 (2 BvM 1/76), Nr. 32 (Tubingen, 1978), pp. 388–389, para. 6 ("This concerns not merely action that a State can successfully uphold from the outset against application of an existing general rule of international law by way of perseverant protestation of rights (in the sense of the ruling of the International Court of Justice in the *Norwegian Fisheries Case*, ICJ Reports 1951, p. 131)"; *Siderman de Blake v. Republic of Argentina*, United States Court of Appeals for the Ninth Circuit, 965 F.2d (1992), 699, 715, para. 54 ("A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm"); *Domingues v. United States*, Inter-American Commission on Human Rights Report No. 62/02, Case 12.285 (2002), paras. 48–49 ("Once established, a norm of international customary law binds all states with the exception of only those states that have persistently rejected the practice prior to its becoming law"); *Republic of Mauritius v. United Kingdom of Great Britain and Northern Ireland* (Arbitration under Annex VII of the 1982 United Nations Convention on the Law of the Sea), Reply of the Republic of Mauritius (2013), p. 124, para. 5.11 ("The persistent objector rule requires a State to display persistent objection during the formation of the norm in question"). See also the third report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/682), footnote 211.

[347] See, for example, G. Gaja, *Collected Courses of the Hague Academy of International Law*, vol. 364 (2012), p. 43 ("the opposition that the Court considered relevant [in the *Fisheries (United Kingdom v. Norway)* case] consisted in something more than a simple negative attitude to a rule. It concerned an opposition to 'any attempt to apply' the rule, with the suggestion that those attempts had failed"); J. Crawford, *ibid.*, vol. 365 (2013), p. 247 ("Persistent objection must be consistent and clear"); M.H. Mendelson, *ibid.*, vol. 272 (1998), p. 241 ("the protests must be maintained. This is indeed implied in the word 'persistent' ... if the State, having once objected, fails to reiterate that objection, it may be appropriate (depending on the circumstances) to presume that it has abandoned it"); O. Elias, "Persistent objector", in *Max Planck Encyclopedia of Public International Law* (2006), para. 16 ("If a State does not maintain its objection, it may be considered to have acquiesced"). For a recent articulation of the practical and policy considerations served by the requirement for a degree of repetition, see J.A. Green, *The Persistent Objector Rule in International Law* (Oxford, Oxford University Press, 2016), pp. 96–98.

[348] Guide to Practice on Reservations to Treaties, commentary (7) to guideline 3.1.5.3, *Yearbook of the International Law Commission 2011*, vol. II (Part II) ("A reservation may be the means by which a 'persistent objector' manifests the persistence of its objection; the objector may certainly reject the application, through a treaty, of a rule which cannot be invoked against it under general international law").

[349] See A/71/10, para. 63, para. (6) of the commentary to conclusion 15.

[350] See, for example, written comments of Singapore, para. 24; written comments of the United States, p. 18.

circumstances of each case".[351] It is also stipulated that "States cannot ... be expected to react on every occasion, especially where their position is already well known".[352]

Part Seven: Particular customary international law

Conclusion 16: Particular customary international law

1. Comments and observations received

112. The great majority of States commenting on draft conclusion 16 expressed general approval, while making various suggestions as to how the text and commentary might be improved. New Zealand suggested that the text of the conclusion should include the clarification, currently in the commentary, that the States concerned are those among which the rule of particular customary international law in question applies.[353] The United States similarly suggested that the conclusion should clarify that the *opinio juris* to be sought among the States concerned is one in which they accept a certain practice as law among themselves (as opposed to "mistakenly believ[ing] the rule is a rule of general customary international law").[354] The Netherlands considered that the word "applies" in paragraph 1 should be avoided, so as to prevent confusion.[355] The Czech Republic observed that the conclusion should "make it clear that any rule of particular customary international law which operated only in a particular group of States could not create obligations or rights for a third State without its consent".[356] Greece concurred with the commentary's clarification that the application of the two-element approach is stricter in the case of rules of particular customary international law, and added that "it might be useful in the context to distinguish between novel particular customs and derogatory particular customs, which required a stricter standard of proof".[357] The Russian Federation, explicitly endorsing the wording of the draft conclusion, suggested that the matter of "rules applicable to the constituent elements" of particular rules of customary international law should perhaps be examined further, "including the question of whether a particular custom could be formed in the presence of an objecting State".[358]

113. Two States took issue with the definition of particular customary international law provided in paragraph 1, suggesting that certain elements did not represent the current position. The United States noted that "[t]he commentary does not provide any evidence that State practice has generally recognized the existence of bilateral customary international law or particular customary law involving States that do not have some regional relationship", and suggested that these are "theoretical concepts only and are not yet recognized parts of international law".[359] If such a possibility was retained in the draft conclusion, it was added, the commentary "should make clear that the concepts ... constitute examples of progressive development".[360] The Czech

[351] See A/71/10, para. 63, para. (9) of the commentary to conclusion 15.
[352] Ibid.
[353] Written comments of New Zealand, para. 30 (stressing in particular that "practice must be consistent among all of the[se] States").
[354] Written comments of the United States, p. 19.
[355] Written comments of the Netherlands, para. 16 (suggesting instead the words "that binds only a limited number of States").
[356] See A/C.6/71/SR.21, para. 9.
[357] See A/C.6/71/SR.22, para. 12.
[358] See A/C.6/71/SR.21, para. 60.
[359] Written comments of the United States, p. 19.
[360] *Ibid.*, at p. 20.

Republic expressed similar reservations only with regard to particular rules of customary international law that may operate among States linked by a common cause, interest or activity other than their geographical position, observing that no concrete examples have been offered and pointing to the lack of clarity as to how the criterion of "common cause, interest or activity ... [or] community of interest" might be applied in practice.[361] It suggested that either the commentary be expanded to that effect or the reference to such rules be deleted.[362]

114. Most States commenting on the matter, however, accepted that rules of particular customary international law may operate among States linked by a common cause, interest or activity other than their geographical position. The Nordic countries agreed that while "a measure of geographical affinity usually exists between States among which a rule of particular customary international law applies ... in principle particular customary international law can develop among States linked by other common causes, interests or activities".[363] They sought to stress, at the same time, that "such common denominators should be very clearly identifiable among the States concerned".[364] Chile considered it "only natural that different geographical regions and peoples, even those sharing similar interests, should have customary rules that were not general in nature".[365] Belarus similarly noted that "the practice giving rise to a rule of customary international law could depend on technological, scientific, geographical or other State strengths or characteristics," including historical, military and political.[366] Austria, in specifically appreciating that the draft conclusion acknowledged the possibility of a rule of particular customary international law developing among States linked by a common cause, interest or activity other than their geographical position, considered it useful to include examples of such rules in the commentary, and pointed to two possible ones.[367] Slovakia likewise indicated that "there was no reason why a rule of particular customary international law should not also develop among States linked by a common cause, interest or activity or constituting a community of interest", but similarly suggested that the commentary should provide more clarity with regard to such rules.[368] New Zealand concurred that rules of particular customary international law may exist "in a particular common geographic or other context", but considered that "they cannot replace or derogate from fundamental principles of international law" and suggested that this should be reflected in the commentary.[369]

2. Suggestions by the Special Rapporteur

115. That a rule of particular customary international law may apply between as few as two States seems difficult to deny. The International Court of Justice has held — in response to a claim that that no rule of customary international law could be

[361] Written comments of the Czech Republic, p. 3.

[362] *Ibid.*; see also A/C.6/71/SR.21, para. 9.

[363] Joint Nordic written comments, p. 2.

[364] *Ibid.*

[365] See A/C.6/71/SR.21, para. 103.

[366] Written comments of Belarus, p. 5 (adding that "it is widely accepted that there are certain customs that are followed by the 'space-faring nations' or by other nations in a high-tech field", and noting the possible relevance of the term "specially-affected States" in this context, as representing the relevant States); see also A/C.6/71/SR.23, para. 4.

[367] See A/C.6/71/SR.21, para. 76 ("It would be useful to include a few examples in the commentary, such as the development of an understanding that the death penalty and the use of nuclear weapons were already prohibited by particular customary international law").

[368] See A/C.6/71/SR.23, para. 24.

[369] Written comments of New Zealand, para. 29.

established between only two States — that "[i]t is difficult to see why the number of States between which a local custom may be established … must necessarily be larger than two".[370] The commentary adopted on first reading lists several examples.[371] Virtually all States commenting on draft conclusion 16 took no issue with this matter.[372] In these circumstances, the Special Rapporteur considers that that the reference to bilateral customary international law should be retained.

116. As for rules of particular customary international law applying among States that do not have some geographical relationship, it will first be recalled that the present commentary states that "there is no reason *in principle* why [such] a rule of particular customary international law should not also develop".[373] The commentary also recognizes that "particular customary international law is mostly regional, sub-regional or local".[374] It will also be recalled that the expression "whether regional, local or other" did not exist in the Special Rapporteur's original proposal for the conclusion,[375] but was included because members of the Commission preferred a more detailed text.

117. In addition, the comments from States confirm that the possibility of rules of particular customary international law operating among States linked by a common cause, interest or activity other than their geographical position is not purely theoretical, and mentioned some possible examples which might be included in addition to the *Case concerning rights of nationals of the United States of America*.[376] Including such examples in the commentary does not seem necessary in the present context, also bearing in mind that the conclusions do not aim to address the content of customary international law and are concerned only with the methodological issue of how rules of customary international law are to be identified.[377]

118. The Special Rapporteur thus considers that the present text of paragraph 1 is satisfactory. If the Commission were nevertheless minded to redraft the text to take account of the concerns raised, a possible formulation could indicate that rules of particular customary international law "include those that are regional or local", and the commentary could then explain that these are the principal manifestations, but

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[370] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 39 (the Court adding that it "sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States").

[371] See A/71/10, para. 63, para. (4) of the commentary to conclusion 16.

[372] It may be recalled in this context that the United States has itself sought to rely on customary international law of this kind before the International Court of Justice: *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952*, p. 176, at pp. 199–200; Counter-Memorial submitted by the Government of the United States of America (20 December 1951), pp. 385–388; Record of the oral proceedings of 23 July 1952, p. 284.

[373] See A/71/10, para. 63, para. (5) of the commentary to conclusion 16 (emphasis added).

[374] Ibid.

[375] See the third report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/682), para. 84.

[376] See footnote 372 above. It may also be noted that the *Restatement of the Law Third of the Foreign Relations Law of the United States* refers to particular customary international law by stipulating that "[t]he practice of states in a regional *or other special grouping* may create 'regional,' 'special,' or 'particular' customary law for those states inter se" (emphasis added): Restatement of the Law, Third, Foreign Relations Law of the United States (1987), §102, comment (e).

[377] As is made clear in the commentary to draft conclusion 1: A/71/10, para. 63, para. (5) of the commentary to conclusion 1.

that it is not excluded that there could be "other" ones. In any event, the Special Rapporteur accepts that the commentary should clarify further how the two-element approach enshrined by the conclusions applies in the case of rules of particular customary international law, and that such rules create no obligations for third States. It will be recalled that the Drafting Committee deliberately "elected to use the term 'apply' [in paragraph 1] rather than employ the notion of 'invocability' by or against a State or to introduce an element of 'bindingness'".[378]

119. As for other suggestions concerning paragraph 2, the Special Rapporteur agrees that the words "among themselves", which are already included in the commentary,[379] could with advantage be added in order to clarify the acceptance as law that is to be sought in the present context. Paragraph 2 would then read:

> *To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law among themselves* (opinio juris).

II. Making the evidence of customary international law more readily available

120. The Commission's renewed engagement with the question of ways and means for making the evidence of customary international law more readily available was welcomed by States.[380] Several referred specifically to the importance of the accessibility of evidence of customary international law in the various languages.[381] The Special Rapporteur agrees.

121. Following its consideration of the Special Rapporteur's fourth report in 2016, the Commission requested the Secretariat to prepare a memorandum on ways and means for making the evidence of customary international law more readily available, which would survey the present state of the evidence of customary international law and make suggestions for its improvement.[382] Such a survey had been undertaken by the Secretariat in 1949, on the occasion of the first session of the Commission, in preparation for the Commission's consideration of the matter pursuant to article 24 of its statute.[383] The new memorandum prepared by the Secretariat for consideration at the present session reflects the fact that since 1949 both the scope of customary

[378] Statement of the Chairman of the Drafting Committee (29 July 2015), pp. 21–22, available at http://legal.un.org/ilc/ (The Chairman of the Committee further explaining that "[t]o the extent that latter considerations seem to invite questions of possible 'effects', it was considered that they raised more questions than answers, while 'applies' has the simplicity of being prima facie factual and easily understood by the intended user").

[379] See A/71/10, para. 63, para. (7) of the commentary to conclusion 16.

[380] See A/C.6/71/SR.21, para. 20 (Australia), para. 38 (Peru), para. 87 (United Kingdom), para. 95 (Portugal), para. 118 (Germany); A/C.6/71/SR.22, para. 18 (Brazil), para. 33 (Ireland), para. 61 (Japan); A/C.6/71/SR.23, para. 12 (Republic of Korea) and para. 34 (Slovenia).

[381] See A/C.6/71/SR.21, paras. 129–130 (the Netherlands) and para. 139 (Sudan); and A/C.6/71/SR.22, para. 61 (Japan).

[382] See A/71/10, para. 56.

[383] A/CN.4/6 and Corr.1, "Ways and means of making the evidence of customary international law more readily available: preparatory work within the purview of article 24 of the statute of the International Law Commission" (1949).

international law and the availability of evidence for its identification have changed strikingly.[384]

123. In assembling the data analysed in the memorandum, the Secretariat sought the cooperation of States in order to identify the resources that they deemed most relevant for ascertaining their own practice and *opinio juris*.[385] Information was also requested from all entities in the United Nations system and all entities and organizations which, as of 2016, had received a standing invitation to participate as observers in the sessions and the work of the General Assembly.[386] A number of learned societies, academic research centres and libraries specializing in international and comparative law were contacted.[387] The input received was complemented by a survey, conducted by the Secretariat, of the "most readily available primary sources of evidence from States and international organizations".[388]

123 The memorandum itself sets out in some detail the available materials, and the Secretariat's methodology in preparing the document. It has seven annexes setting out the information collected: (I) Resources by State; (II) Resources by organization; (III) Resources by field of international law; (IV) Collections of treaties and depositary information; (V) International courts and tribunals, hybrid courts, and treaty monitoring bodies; (VI) Bodies engaged in the examination, codification, progressive development, or harmonization of international law; and (VII) Languages of the resources collected.

124. On the basis of the information collected, and as requested by the Commission, the Secretariat has made a number of suggestions for improving the availability of the evidence of customary international law, which are set out in chapter II of the memorandum. These suggestions fall into four categories: (a) suggestions concerning ways and means for States to make the evidence of their practice and acceptance as law (*opinio juris*) more readily available;[389] (b)suggestions concerning ways and means for the United Nations to maintain and develop its legal publications relevant to international law and ensure their widest dissemination;[390] (c) suggestions concerning ways and means for enhancing the availability of evidence of customary international law in the context of the progressive development and codification of international law;[391] and (d) there are suggestions concerning a periodically updated online database for the systematic and comprehensive dissemination of bibliographic information concerning the evidence of customary international law.[392]

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[384] A/CN.4/710, "Ways and means for making the evidence of customary international law more readily available" memorandum by the Secretariat", para. 6.

[385] *Ibid.*, at para. 7.

[386] *Ibid.*, at para. 8.

[387] *Ibid.*, at para. 9.

[388] *Ibid.*, at para. 10.

[389] *Ibid.*, at paras. 103–107.

[390] *Ibid.*, at paras. 108–115. The publications include the following: *I.C.J. Pleadings*, *I.C.J. Reports*, *Law of the Sea Bulletin*, *Diplomatic Conferences*, *Repertoire of the Practice of the Security Council*, *Repertory of Practice of United Nations Organs*, *Reports of International Arbitral Awards*, *Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice*, *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, *The Work of the International Law Commission*, *United Nations Commission on International Trade Law Yearbook*, *United Nations Juridical Yearbook*, *United Nations Legislative Series*, *United Nations Treaty Series*; *and Yearbook of the International Law Commission*.

[391] Ibid., at paras. 116–119.

[392] Ibid., at paras. 120–122.

125. The Special Rapporteur wishes to draw attention to one point in particular that is emphasized in the memorandum, the critical importance of the "continuous development of libraries specializing in international law and the guarantee of their general access by the public".[107] The Special Rapporteur is grateful to the Library of the United Nations Office at Geneva and its excellent staff for all their assistance with the present topic.

126. The Special Rapporteur recommends that the Commission endorse the Secretariat's suggestions, and forward them to the General Assembly for its consideration. A recommendation to that effect is included in the draft recommendation to the General Assembly in paragraph 129 below. The Special Rapporteur also recommends that the memorandum be reissued in due course to reflect the text of the conclusions and commentaries adopted on second reading.

III. Final form of the Commission's output

127. As suggested in the Special Rapporteur's fourth report[108] and supported in the written and oral comments of States, it is proposed that the final outcome under the present topic consist of three components: (*a*) a set of conclusions with commentaries adopted by the Commission; (*b*) the Secretariat memorandum on ways and means for making the evidence of customary international law more readily available; and (*c*) a bibliography.

128. A question left pending from the first reading stage concerns the use of the term "conclusions" to describe the Commission's output on the present topic; some asked whether the term "guidelines" would not be more appropriate, given the objective of providing practical guidance on the way in which the existence or otherwise of rules of customary international law, and their content, are to be determined.[109] Having considered the matter carefully, the Special Rapporteur is of the view that the term "conclusions" is appropriate in the present context and consistent with providing guidance. He suggests that it be retained.

129. The Special Rapporteur proposes that the Commission recommend that the General Assembly:

a. *Take note* of the conclusions of the International Law Commission on the identification of customary international law in a resolution, annex the conclusions to the resolution, and ensure their widest dissemination;

b. *Commend* the conclusions, together with the commentaries thereto, to the attention of States and all who may be called upon to identify rules of customary international law;

c. *Welcome* the Secretariat memorandum on ways and means for making the evidence of customary international law more readily available (A/CN.4/710), which surveys the present state of evidence of customary international law and makes suggestions for its improvement;

d. *Decide* to follow up the suggestions in the Secretariat memorandum by:

[107] Ibid., at para. 107.

[108] Fourth report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/695), paras. 50–53.

[109] Ibid., at para. 12. See also A/CN.4/SR.3303, provisional summary record of the Commission's 3303rd meeting (24 May 2016), p. 8.

(i) *calling* to the attention of States and international organizations the desirability of publishing digests and surveys of their practice relating to international law, of continuing to make the legislative, executive and judicial practice of States widely available, and of making every effort to support existing publications and libraries specialized in international law;

(ii) *requesting* the Secretariat to continue to develop and enhance United Nations publications providing evidence of customary international law; and

(iii) *also requesting* the Secretariat to make available the information contained in the annexes to the memorandum on ways and means for making the evidence of customary international law more readily available (A/CN.4/710) through an online database to be updated periodically based on information received from States, international organizations and other entities.

130. The Special Rapporteur is currently updating the bibliography that was annexed to the fourth report. A revised version will be circulated to Commission members informally in advance of the session, and then (amended in light of suggestions received) issued as annex II to the present report.

nnex

Draft conclusions adopted on first reading, with the Special Rapporteur's suggested changes

Identification of customary international law

Part One
Introduction

Conclusion 1
Scope

The present draft conclusions concern the way in which the existence and content of rules of customary international law are to be determined.

Part Two
Basic approach

Conclusion 2
Two constituent elements

To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).

Conclusion 3
Assessment of evidence for the two constituent elements

1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.

2. Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.

Part Three
A general practice

Conclusion 4
Requirement of practice

1. The requirement of a general practice, as a constituent element of customary international law, ~~of a general practice means that it is primarily~~ refers to the practice of States as expressive, or creative~~that contributes to the formation, or expression~~, of rules of customary international law.

2. In certain cases, the practice of international organizations may also contributes to the ~~formation, or~~ expression, or creation, of a rules of customary international law.

3. Conduct of other actors is not practice that contributes to the ~~formation, or~~ expression, or creation, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.

Conclusion 5
Conduct of the State as State practice

State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.

Conclusion 6
Forms of practice

1. Practice may take a wide range of forms. It may includes both physical and verbal acts, as well as ~~. It may, under certain circumstances, include~~ deliberate inaction.

2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.

3. There is no predetermined hierarchy among the various forms of practice.

Conclusion 7
Assessing a State's practice

1. Account is to be taken of all available practice of a particular State, which is to be assessed as a whole.

2. Where the practice of a particular State varies, the weight to be given to that practice may, depending on the circumstances, be reduced.

Conclusion 8
The practice must be general

1. The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as virtually uniform~~consistent~~.

2. Provided that the practice is general, no particular duration is required.

Part Four
Accepted as law (*opinio juris*)

Conclusion 9
Requirement of acceptance as law (*opinio juris*)

1. The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation.

2. A general practice that is accepted as law (*opinio juris*) is to be distinguished from mere usage or habit.

Conclusion 10
Forms of evidence of acceptance as law (*opinio juris*)

1. Evidence of acceptance as law (*opinio juris*) may take a wide range of forms.

2. Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications;

government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.

3. Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.

Part Five
Significance of certain materials for the identification of customary international law

Conclusion 11
Treaties

1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:

(a) codified a rule of customary international law existing at the time when the treaty was concluded;

(b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or

(c) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law.

2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.

Conclusion 12
Resolutions of international organizations and intergovernmental conferences

1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.

2. A resolution adopted by an international organization or at an intergovernmental conference may, in certain circumstances, provide evidence for determining~~establishing~~ the existence and content of a rule of customary international law, or contribute to its development.

3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).

Conclusion 13
Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.

2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules.

Conclusion 14
Teachings

Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law.

Part Six
Persistent objector

Conclusion 15
Persistent objector

1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.

2. The objection must be clearly expressed, made known to other States, and maintained persistently.

3. The present conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).

Part Seven
Particular customary international law

Conclusion 16
Particular customary international law

1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.

2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law among themselves (*opinio juris*).